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Final Decision Authority and the Central Panel ALJ

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Final Decision Authority and the Central Panel ALJ

By Larry J. Craddock*

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I. INTRODUCTION

This is Part I of a two-part paper on the 2012 National Administrative Law Judiciary Foundation (NALJF) Fellowship Topic. The topic is, “A survey of final decision authority among central panel states with interpretative analysis and policy implications.”¹

The first part of the paper will explore, analyze, and critique the arguments for and against final decision authority for central panel administrative law judges (ALJ).² It will also articulate well-documented concerns regarding the conflicting interests posed by having the heads of agencies serve as both primary litigants and final

*This paper is dedicated to my friend and mentor, the late John W. Hardwicke, the first Chief Administrative Law Judge (ALJ) of the Maryland Office of Administrative Hearings (OAH) and one of the pioneers of central panel adjudication.

¹ 2012 *Fellowship Competition*, NAALJ NEWS (Nat’l Ass’n of Admin. Law Judiciary, Des Moines, Iowa), Jan. 2012, at 10. I presented a very preliminary preview of this paper to the 2012 National Association of Administrative Law Judiciary (NAALJ) annual conference in New Orleans. In addition, Julian Mann (Director and Chief ALJ, North Carolina OAH) and I moderated a related panel discussion of the topic. The panel consisted of Robert S. Cohen, Chief ALJ, Florida Department of Administrative Hearings; Thomas E. Dewberry, Chief ALJ, Maryland OAH; Jeff S. Masin, Deputy Chief ALJ, New Jersey Office of Administrative Law; Ann Wise, Director, Louisiana Office of Administrative Law; Tom Stovall, Chief ALJ of the Administrative Procedures Division, Tennessee Secretary of State; Raymond R. Krause, Chief ALJ, Minnesota OAH; Gregory L. Ogden, Professor of Law, Pepperdine University (who was the reporter for the Drafting Committee of the 2010 Model State Administrative Procedure Act); and Ann Marshall Young, Administrative Judge, United States Nuclear Regulatory Commission.

² The term “administrative law judge” (ALJ) is generally used in this paper to refer to all administrative adjudication presiding officers—although some jurisdictions may use different terminology such as “hearing officer,” “hearing examiner,” “referee,” or some other term. The federal government distinguishes between ALJs and administrative judges (AJs) presiding in administrative hearings based on whether the person is an ALJ appointed through the Office of Personnel Management (OPM) pursuant to the federal Administrative Procedure Act (federal APA) or an AJ appointed outside the federal APA procedure. This distinction in title has no application in state administrative law. Unless otherwise stated or required by the context, the use of the title “ALJ” in this paper is not a reference to how (or pursuant to what statute) the ALJ was appointed.

decision-makers over cases adjudicated by central panel ALJs. Arguments will be based upon the author's own two decades of experience working as an ALJ in Texas—as well as working with ALJs and state agency heads in his other roles at state agencies—and on a review of key literature, case law, and commentary on the subject. Part I of the paper will conclude with a discussion of several law review articles on final decision authority for central panel ALJs published in national law journals—two articles each by Professors James F. Flanagan and Jim Rossi, and an article by Professor James E. Moliterno.³ All articles support retention of final decision authority in the agency head.⁴

The second part of this paper will appear in a future issue of this journal. It will contain a detailed discussion of the debate and controversy surrounding the Uniform Law Commission's⁵ (ULC) decision not to include final decision authority for central panel ALJs as an option for adoption by state legislators in the 2010 Model State

³ See James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355 (2002) [hereinafter Flanagan, *Redefining the Role*]; James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401 (2005) [hereinafter Flanagan, *An Update*]; Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence with Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (1999) [hereinafter Rossi, *Final Orders on Appeal*]; Jim Rossi, *Final, but Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53 (2004) [hereinafter Rossi, *Final, but Often Fallible*]; James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191 (2006).

⁴ *Id.* There have also been law review articles and essays supporting the transfer of final decision authority from the agencies to central panel ALJs. These are discussed *infra* at note 184 and accompanying text.

⁵ The ULC was formerly named the National Conference of Commissioners on Uniform State Laws (NCCUSL). See *State Administrative Procedure Act, Revised Model Summary*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/ActSummary.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model> (last visited Nov. 8, 2013) (regarding the 2010 MSAPA). The 2010 MSAPA was the fourth MSAPA recommended by this organization. See *id.* The organization recommended earlier MSAPAs in 1946, 1961, and 1981. *Id.* Most jurisdictions have a variation of the 1961 MSAPA. In the discussion that follows, the organization will be referred to by the name it was using in the period under discussion, but the reader should understand that NCCUSL and the ULC are the same organization.

Administrative Procedure Act (MSAPA). Although the subject of final decision authority continued to be debated, the full commission adopted the ULC's draft in the plenary session.⁶

A brief review of the events will provide some context for the subject of this paper. The debate concerning whether or not to provide a specific section for optional final decision authority for central panel ALJs led to organized opposition to the 2010 MSAPA from three national ALJ groups—the Central Panel Directors Conference (CPDC), the National Association of Administrative Law Judiciary (NAALJ), and the American Bar Association (ABA) National Conference of the Administrative Law Judiciary (NCALJ).⁷ At the outset of the process of drafting the 2010 MSAPA, the 1997 ABA Model Act for Creation of a Central Hearing Agency (1997 ABA Model Act) was used as a model for drafting sections pertaining to central panels.⁸ The 1997 ABA Model Act contained a provision specifically allowing the state legislature “the option to delegate final decision making authority to central panels.”⁹ The ALJ organizations viewed the deletion of that provision from the 2010 MSAPA as a step backward.¹⁰ I had the opportunity to serve as an ABA section advisor to the drafting committee of the 2010 MSAPA (along with several other ALJs), so I am very familiar with the drafting committee proceedings.¹¹

⁶ *Id.*

⁷ See AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2–3 (2011), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/112_2011_my.authcheckdam.pdf.

⁸ See *id.* at 3.

⁹ See *id.*

¹⁰ See *id.*

¹¹ The other ALJ ABA Section Advisors to the drafting committee were Edward J. Schoenbaum, retired ALJ, Illinois Department of Employment Security of Springfield, Illinois, representing the ABA's Administrative Law and Regulatory Practices Section; Edwin L. Felter, Jr., Senior ALJ in the Colorado Office of Administrative Courts, and Adjunct Professor at Sturm College of Law in Denver, Colorado, representing the ABA's Government and Public Sector Lawyers Division; and Julian Mann III, Director and Chief ALJ, North Carolina OAH, representing the ABA's National Conference of ALJs. I served as an advisor to the drafting committee on behalf of the ABA's Judicial Division. In addition, Professor Asimow, who appointed the original advisors for the ABA's

In addition to a discussion of the debate surrounding the central panel-related provisions of the 2010 MSAPA, the second part of this paper will include up-to-date survey information from all central panel jurisdictions regarding: (1) the size of the panel, its historical development, and the scope of its current jurisdiction; (2) the extent, if any, to which it now has final decision authority; (3) the source of that authority, whether legislative, through court order, or by voluntary transfer from line agencies; (4) the extent, if any, to which final decision authority has been an issue in each jurisdiction; and (5) related matters. I invite input from readers of the first part of the paper as to related matters that the survey should cover.

Because the journal publishing this article has an ALJ orientation, most readers are likely familiar with central panels. However, a brief definition will provide clarity and context for purposes of review. Most succinctly, a central panel is an agency of ALJs established to conduct administrative adjudications for other agencies.¹² The central panel's main role is to provide fair adjudications and due process to both the litigating agencies and the public.¹³ The central panel ALJ is independent of, and not subject to

Administrative Law and Regulatory Practices Section, lists Ann Marshall Young, AJ of the Nuclear Regulatory Commission and former Tennessee Central Panel ALJ, as one of its advisors to the drafting committee (although her name has been omitted from the published list of advisors). See Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L. J. 707, 707 (2011).

¹² "A central panel system of administrative law judges (ALJs) is one in which a central office of administrative hearing employs a staff of ALJs and assigns them, on the request of administrative agencies, to preside over agency proceedings." See, e.g., L. Harold Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236, 236 (1981) (footnote omitted). Another formal definition of the term "central panel" is contained in the article by Julian Mann III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N ADMIN. L. JUDICIARY 151, 155 (1995): "[A] central panel is an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges who hear and decide a wide-range of administrative cases."

¹³ The U.S. Supreme Court decisions in such "due process revolution" cases as *Goldberg v. Kelly*, 394 U.S. 254 (1970), provided a major incentive for states to form central panels. See John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N ADMIN. L. JUDICIARY 5, 5-8 (1994); Lori Kyle Endris & Wayne E. Penrod, *Judicial*

control or influence by, the agencies for which the ALJ conducts hearings.¹⁴ Instead, the ALJ reports to a chief ALJ or central panel director.¹⁵ A few central panels have other related duties such as publication of the register in which state agency rules are published for review, comment, and adoption;¹⁶ however, the main duty of all

Independence in Administrative Adjudication: Indiana's Environmental Solution, 12 ST. JOHN'S J. OF LEGAL COMMENT. 125, 126–29 (1996). As these authors explain, *Goldberg* and related cases greatly expanded the need for fair hearings presided over by neutral, unbiased adjudicators such as are found in a central panel. For the first time, the cases required states to provide “some kind of hearing” presided over by a neutral, unbiased adjudicator before a decision to deprive citizens of newly expanded property rights became final. These rights were now held to include many government-conferred benefits such as licenses, welfare benefits, and government employment. Before *Goldberg*, the courts had regarded these benefits as merely governmentally conferred privileges—not property rights—and held that as mere privileges they were subject to being taken away by the state without any fair hearing requirement. See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). After *Goldberg*, many state legislatures created central panels in response to the new hearing requirements. The articles mentioned earlier in this footnote by Hardwick and Endris and Penrod both cite to an influential law review article on point by Second Circuit Judge Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975). In his article, Judge Friendly stresses the importance of an impartial adjudicator and opines that the further the ALJ is removed from the agency, the greater the likelihood that the hearing will satisfy the constitutional neutral adjudicator requirement. Friendly, *Some Kind of Hearing*, at 1279.

¹⁴ See Levinson, *supra* note 12, at 236–37.

One of the basic purposes of central panel systems is to give ALJs a certain amount of independence from the agencies over whose proceedings they preside. From an organizational standpoint, this is accomplished by separating the office of administrative hearings from the agencies and excluding the agencies from any control over the appointment of ALJs or their assignment to specific proceedings.

Id.

¹⁵ See Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 81 (1994) (“The central panel corps in the various states are headed up by either a chief administrative law judge or a director who is usually appointed by the governor with the consent of the state senate.”).

¹⁶ See, e.g., N.C. GEN. STAT. § 150B-2(1c) (2013) (designating the Chief ALJ of the OAH or a designee as the “Codifier of Rules”); § 150B-21.1(e) (making

central panels is to conduct fair and impartial hearings for other agencies.

As another preliminary matter, because my comments in this paper are at times based on my own experience, I should state briefly what that experience has been. Most pertinently, I served for more than twenty years as the ALJ for the Texas Finance Commission, an “umbrella agency” which oversees and coordinates the activities of the Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, and the Office of Consumer Credit Commissioner of Texas. In addition, I was a contract-hearing officer conducting Special Education Due Process Hearings for the Texas Education Agency for approximately five years.

Earlier this year, following forty-nine years of practice, I retired to an “of counsel” position with the Austin law firm of Craddock and Noelke, PLLC, which specializes in contract ALJ work for Texas state agencies. I have conducted many hearings, but have never conducted hearings for a central panel. Texas is a central panel state, but the hearings that I conducted were on subject matters or for agencies outside the central panel’s jurisdiction. All of my decisions for the Finance Commission agencies were subject to agency head review on both facts and law before a final decision was issued. However, to the best of my knowledge, the agencies never changed my fact-findings. I had final decision authority in the contract Special Education Due Process Hearings I conducted for the Texas Education Agency.

My background also includes eight years doing trial and appellate work, in state and federal court, representing state agencies and officials as an Assistant Attorney General of Texas and serving on the Attorney General’s Opinion Committee; twelve years as an aid to three Texas governors (including roughly five years as Assistant General Counsel to the Governor); more than five years as an aid to the Texas Comptroller (including three years as his General Counsel); and a year as Chief Legal Advisor to the Public Utility Commission of Texas.

the Chief ALJ of the OAH or the designee responsible for publication of the Rules in the North Carolina Register).

II. SPLIT-DECISION AUTHORITY

Before sending a final draft of this paper to the NAALJ Journal for publication, I circulated it to administrative adjudication experts for review and comment. The reviewers included the current members of the NAALJ Journal Board of Advisors and members of the CPDC. The comments I received gave me the opportunity to see some reaction to what I originally wrote, and, in some instances, surprised me. I have revised the paper to respond to some of these comments and will from time to time refer to them in the paper as comments by early reviewers of the paper.

I had originally planned to defer the discussion of “split-decision authority” to the second part of the paper as part of the discussion of the development of the 2010 MSAPA, since split-decision authority was an issue raised at several points in the drafting sessions.¹⁷ However, after reading the comments, I have decided to place the discussion of split-decision authority in this first part of the paper instead of postponing the discussion.

Two early reviewers of the paper were law professors. In reading the paper, they understood me to argue that either the agency head or the ALJ should have final decision authority on both facts and law in every case and that there is no middle ground.

One of the law professors stated:

[The paper] . . . makes agency-head review of ALJ decisions an all-or-nothing matter. There could be agency-head review, but within certain constraints or agency decisions reversing ALJs could be subjected to more rigorous judicial review. My understanding is that in North Carolina, if the agency head modifies or overturns the ALJ’s decision, the court will review the record de novo. Indeed, the author alludes to some proposals to limit agency-head reviewing power, but does not challenge those proposals. Indeed, the author does not critique the current North Carolina approach to agency-head reversal. So even if the author has convincingly established that a regime of agency-head

¹⁷ Usually, I was the one who raised it.

review under no constraints should be rejected, he has not grappled with the more difficult question of whether it makes sense under some constraint.¹⁸

I need to clarify my position on the split-decision authority issue. In Part I of the paper as originally circulated, I did not discuss split-decision authority at all, and so the professor was drawing an inference about what my opinion is on the split-authority issue. To make that opinion perfectly clear, I believe final decision authority can properly be split so that the ALJ has final authority to decide facts and the agency head has final authority to decide policy issues.¹⁹

One of the law professor reviewers correctly noted that my home state of Texas splits final decision authority between the central panel ALJ (who has final decision authority over facts) and the agency head (who has final decision authority over policy issues). Texas has followed this split-decision making model since it became a central panel state and, in the opinion of many, it has worked well over the years. Under the original Texas statutes enacting this model into law, the central panel ALJ's fact-findings and conclusions of law

¹⁸ This reviewer is correct as to what North Carolina required at one time whenever the agency changed the central panel ALJ's decision on either facts or law. However, the North Carolina statute has now been amended to give central panel ALJs final decision authority without agency review. N.C. GEN. STAT. § 150B-34(a) (2012). Effective January 1, 2012, the statutory law of North Carolina was amended to revise § 150B-34(a) of the General Statutes titled *Final Decision Order*, to read as follows:

(a) In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.

Id.

¹⁹ The law is for the reviewing court to apply *de novo* giving great deference to the agency's interpretations of its enabling statute and to any properly promulgated agency rules and regulations. See CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE §§ 5:28(4), 11:32(1) (3d ed. 2010).

were subject to agency review and modification only for reasons of policy.²⁰ This model has been the subject of several excellent law review articles.²¹ In recent years, the Texas statutes setting forth this model have been amended to specify the reasons that an agency head can change central panel ALJ fact-findings with greater particularity.²² These specific reasons are:

- (1) [T]he [ALJ] did not properly apply or interpret applicable law, agency rules, written policies . . . or prior administrative decisions;
- (2) [A] prior administrative decision on which the [ALJ] relied is incorrect or should be changed; or
- (3) [A] technical error in a finding of fact should be changed.²³

A 2012 Texas CLE panel presentation discussed, among other issues, why the legislature reworded the original Texas statutes allowing agencies to modify central panel decisions for policy reasons.²⁴ It was because, during review, the heads of litigating agencies proposed decisions of central panel ALJs, and sometimes the courts had difficulty understanding and consistently applying the Texas statutes related to the fact/policy distinction under the statutes as originally worded.²⁵ The primary reason for rewording the original language was to make it easier for the agencies and the

²⁰ See Ron Beal, *The Texas State Office of Administrative Hearings: Establishing Independent Adjudications in Contested Case Proceedings While Preserving the Power of Institutional Decision-Making*, 25 J. NAT'L ASS'N ADMIN. L. JUDICIARY 119 (2005); F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 BAYLOR L. REV. 65 (1998); F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an ALJ?: Part II*, 51 BAYLOR L. REV. 63 (1999).

²¹ See *id.*

²² See TEX. GOV'T CODE ANN. § 2001.058(e) (West 2013).

²³ *Id.*

²⁴ See John M. Hohengarten, Dudley D. McCalla, & Jon Eugene Porter, Jr., 7th Annual Advanced Administrative Law Seminar at the University of Texas School of Law: Should SOAH Make Final Decisions (Aug. 31, 2012). No paper was prepared for this seminar topic and the text statement above is based on my recollection and notes of the panel debate.

²⁵ *Id.*

courts to consistently apply review standards limiting agency authority to change ALJ fact-findings.²⁶

As I expect will be shown in the survey in Part II of this paper, many other states have adopted statutory provisions similar to the ones in Texas to restrict agency authority to overturn central panel ALJ fact-findings. This would reflect information contained in the Central Panel Directors letter to the head of the ULC complaining of the ULC's failure to include discretionary authority for ALJs in the 2010 MSAPA.²⁷ In this regard, the Central Panel Directors wrote:

Nearly every jurisdiction that presently has a central panel provides in some measure for the option of final decision making by central panel judges. Some jurisdictions have granted total final decision authority to the central panel but *most jurisdictions have a combination or a hybrid of recommended and final orders*.²⁸

I have no problem with the split-decision structure if it works satisfactorily in the jurisdictions that have adopted it, and do not mean to suggest otherwise in this paper. Indeed, I fought for the split-decision model in the development of the portion of the 2010 MSAPA related to central panel adjudication. However, this was one of the issues on which the drafting committee did not follow my recommendations.

Because I knew that Professor Ron Beal of the Baylor University Law School was a strong advocate of this model, I contacted him and urged him to present his views on the benefits of the split-decision model to the 2010 MSAPA drafting committee. Professor Beal presented these views in writing to the drafting committee, in part, as follows:

²⁶ *See id.*

²⁷ Letter from Peter Plummer, Head of the Central Panel Directors Conference, to the Unif. Law Comm'n (July 6, 2010) (on file with author).

²⁸ *Id.* (emphasis added).

I believe that ad law in Texas has fundamentally changed for the better by having the ALJ being the final authority on basic, underlying facts. At least [I would] suggest to [the drafting committee] they put this in [the 2010 MSAPA] as an alternative for states who want to truly have an independent but interdependent . . . [central panel/agency head] decision or order.²⁹

Professor Gregory L. Ogden of Pepperdine University School of Law, in his role as the reporter for the 2010 MSAPA, transmitted Professor Beal's comments to the drafting committee, along with Professor Ogden's own comments, as follows:

[N]o change [to add language that incorporates Professor Beal's suggestion in the 2010 MSAPA] [is] recommended. The existing approach [in the draft 2010 MSAPA] is consistent with the Universal Camera federal standard. This proposal [to make the ALJ the final authority on the facts] would . . . make ALJ fact determinations almost unreviewable by the agency head rather than giving deference to the ALJ fact findings based on demeanor evidence and credibility determinations.³⁰

Professor Ogden's recommendation—rather than my recommendation and Professor Beal's recommendation on this point—was adopted by the drafting committee and by the ULC in the final 2010 MSAPA.

To clarify my position in this paper: If faced with the option of vesting all final decision authority in the neutral central panel ALJ or in the agency head, I would support placing it all in the neutral central panel ALJ based on the arguments stated throughout this

²⁹ Gregory L. Ogden, *MSAPA Drafting Committee Agenda for February 12 to 14, 2010 Meeting*, UNIFORM LAW COMMISSION 20–21, http://www.uniformlaws.org/shared/docs/state_administrative_procedure/msapa_detailed%20agenda_021210.pdf (last visited Nov. 12, 2013).

³⁰ *Id.*

paper. I do not oppose the split-decision model used in Texas and other jurisdictions. It seems to be working well in some states, including Texas.

Although I felt strongly at the time the 2010 MSAPA was developed that the split-decision model was the best option for central panel adjudication, as I have studied the issue more fully, I have come to the view that, perhaps, the best option would be to fully develop the record on all issues, let the central panel ALJ write a final decision, and let the agency and/or the private litigant appeal to the courts if unhappy with the decision.

The information to be provided in the survey results should shed further light on this matter. It will be interesting to see what the experience has been in the central panel jurisdictions on the split-decision option versus the option to place all final decision authority on facts and law in either the central panel ALJ or in the litigating agencies.

III. MAIN ISSUE PRESENTED

The questions at the heart of this paper are simple:

Should an agency head finally decide cases that a neutral central panel ALJ adjudicates when the agency's staff has actively prosecuted or defended the case; or, alternatively, should the central panel ALJ who adjudicates the case make the final decision without agency review subject to an appeal to the courts by the losing party?

More pointedly, in *The Central Hearing Agency: Theory and Implementation in Maryland*, Judge John W. Hardwicke refers to the central panel ALJ as "the hearer," and he stated this issue as follows:

If, in principle, it is necessary to separate the hearer from the agency, is fundamental fairness sacrificed by permitting the agency to superimpose its will upon the final result?³¹

³¹ John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N ADMIN. L. JUDICIARY 5, 9 (1994).

I will assume for purposes of this paper that the losing party—be it a private party or the administrative agency itself—will have a right to appeal an adverse ALJ decision to the courts.³²

IV. HISTORICAL PERSPECTIVE: THE FEDERAL APA; CREATION OF THE ALJ POSITION

The federal APA was unanimously adopted by Congress in 1946 following almost a decade of rancorous debate that was interrupted by World War II.³³ The resulting legislation is seen today

³² In the state of Louisiana, the agency cannot appeal if the central panel ALJ holds against the agency. However, I know of no other jurisdiction that is seeking to structure ALJ finality in the same way as Louisiana. Therefore, I will not argue about whether ALJ final authority with no appeal for the agency should or should not be the law. I think the subject has pretty much been exhausted in the Louisiana Supreme Court case of *Wooley v. State Farm Fire & Casualty Insurance Co.*, 893 So. 2d. 746 (La. 2005), the law review articles discussing the *Wooley* case, and the underlying Louisiana statute. See Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431 (1999); April L. Rolon-Ogden, *When Administrative Law Judges Rule the World: Wooley v. State Farm—Does a Denial of Agency Initiated Judicial Review of ALJ Final Orders Violate the Constitutional Doctrine of Separation of Powers?*, 66 LA. L. REV. 885 (2005); Edward P. Richards & Kelly M. Haggard, *Administrative Finality and the Pelican State: A Recipe for Central Panel Gumbo*, ADMIN. & REG. L. NEWS (Am. Bar Ass'n), 2005, at 4; see also Flanagan, *An Update*, *supra* note 3, at 410–18 (discussing *Wooley*); MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 136–37 (3d ed. 2009) (discussing *Wooley* and related issues); James F. Flanagan, *Developments in State Administrative Law—Central Panels Wooley v. State Farm Fire and Casualty Ins. Co.*, AM. BAR ASS'N (Apr. 19, 2005), http://apps.americanbar.org/adminlaw/spring2005/Flanagan_outline.doc (last visited Nov. 3, 2013). People interested in the final central panel ALJ decision with no agency appeal issue should read those materials. As Ann Wise, director of the Louisiana Central Panel, correctly points out, the *Wooley* decision is well written and self-explanatory. Ann Wise, *Louisiana's Division of Administrative Law: An Independent Hearings Tribunal*, 68 LA. L. REV. 1169, 1194 n.84 (2008).

³³ See George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1558–59 (1996); Michael Asimow, *Administrative Law Judges: The Past and the Future*, N.Y. STATE ADMIN. LAW JUDGES ASS'N, <http://www.nysalja.org/wp-content/uploads/2011/03/aljpastandfuture.pdf> (last visited Nov. 12, 2013); Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297,

as a political compromise between the New Dealers (who wanted agencies to have almost unfettered authority to exercise control over the economy), and the “judicialists” (who wanted to assure that all agency authority was exercised in strict conformity with stringent due process requirements).³⁴ The New Dealers viewed the judicialists and all but very minimal due process requirements as obstructing the reforms needed to preserve and strengthen the American economy.³⁵ The New Dealers viewed the very ability of the American economy to survive the Great Depression to be at stake in the battle with the judicialists over administrative procedural requirements.³⁶

These circumstances begin to get at the root of the debate that caused such rancor over the 2010 MSAPA. One of the questions that we, as a profession, might ask in reviewing the final decision for central panel issue is whether the limitations on due process thought to have been appropriate at the national level when the very future of the nation’s economy was thought to be in jeopardy are still appropriate in central panel state administrative adjudication today. The overriding belief of the New Dealers, which became part of the background for the compromise incorporated in the 1946 federal APA was that, unless due process shortcuts were taken, the national economy would irrevocably crumble.³⁷ This was a strong argument during the depression of the 1930s, less so by 1946 with post-war boom in the U.S. economy beginning to get underway, and is of little if any weight today when considering a state rather than a federal APA. Given that such concerns are not in play in state central panel adjudications, it is worth revisiting the issue of the extent to which agency control over policy should take precedence over providing a fair adjudication to both the agency and individual litigants in those adjudications. As a profession, we may need to ask whether it is time to consider readjusting the scales.

298 (1986); JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 59–108 (2012).

³⁴ See Asimow, *supra* note 33; see also Shepherd, *supra* note 33, at 1678.

³⁵ See Asimow, *supra* note 33, at 1559, 1561–62.

³⁶ See *id.*

³⁷ See *id.*; Shepherd, *supra* note 33.

Many would argue that it is. In his paper, *Tracing the Unique Contours of Administrative Justice: Reconceptualizing the Judicial Model for Administrative Law*, David E. Guinn writes that, “Having agency supervisors alter an ALJ’s factual determination would both appear and would in fact interfere with the party’s right to a fair and impartial hearing.”³⁸

I come at this argument with a clear point of view. Mr. Guinn is undoubtedly right about what fairness requires. I also believe that eventually all central panel states are likely to make it more difficult for agency heads to overturn central panel ALJ fact-findings. The rationale here is simple. With a neutral final decision-maker now available in the central panel states, if one were starting over from scratch, why would one place a litigant in charge of the final decision? This may have been appropriate when the federal system was originally designed and the necessity of dealing quickly and efficiently with the economic problems brought about by the Great Depression and World War II justified—or were used to justify—the near infringement on rights of the regulated community; but are such infringements now necessary or appropriate in modern-day central panel state administrative adjudication?

Historians trace the origin of the ALJ position to the Interstate Commerce Commission (ICC) in 1906 to 1907.³⁹ The ICC, pursuant to statutory authorization by Congress, appointed agency staff members as hearing examiners to take evidence when the commissioners were too busy attending to other duties to personally hear the evidence.⁴⁰ After the hearing, the examiner made a report to the ICC that contained a summary of the evidence and sometimes the examiner’s recommendations about how the commission should decide the case.⁴¹ By 1917, these reports were usually, if not always,

³⁸ David E. Guinn, *Tracing the Unique Contours of Administrative Justice: Reconceptualizing the Judicial Model for Administrative Law* 20 (Sept. 26, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1017306.

³⁹ See Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS & REPORTS 799 (1992).

⁴⁰ See *id.*

⁴¹ See *id.*

written and had more or less assumed the format of today's ALJ recommended decisions.⁴² Traditionally, ALJs have been part of an agency's staff and subject to the agency's control. Prior to the federal APA's enactment in 1946 (and still in some state agencies and in some federal agencies not subject to the federal APA), they sometimes had—and still have—other duties in addition to presiding in administrative hearings.⁴³

The use of in-house ALJs to perform duties other than presiding in administrative hearings has been discontinued in the agencies subject to the federal APA.⁴⁴ The federal APA now contains several provisions designed to keep an in-house ALJ insulated from improper influences by his or her employing agency.⁴⁵ These provisions include merit selection of ALJs through competitive examination by the Office of Personnel Management (OPM), which sends the agency a list of the top three candidates from which the

⁴² *See id.*

⁴³ *See id.* at 799–800 (footnotes omitted):

The roles and duties of examiners [the early designation for ALJs] were not always clearly confined to a purely judge-like role during the several decades prior to enactment of the APA. Although examiners generally tended to preside over trial-type hearings for the agencies, they sometimes performed investigatory duties and, in some agencies, they consulted extensively with superiors about how cases before them should be decided. Writing 9 years after the FTC was established, Henderson (the historian of the FTC) observed that it was then customary for the precomplaint investigation of a case to be conducted by one of the Commissioner's examiners. Henderson's report of this use of examiners shows that examiners were not then viewed as personnel committed solely to judging, but were apparently considered to be open to a wider range of tasks The practice of examiners consulting with agency officials about proposed reports was also followed extensively in the ICC's Bureau of Formal Cases.

⁴⁴ “Administrative law judges . . . may not perform duties inconsistent with their duties and responsibilities as administrative law judges.” 5 U.S.C. § 3105 (2006).

⁴⁵ *See* 5 U.S.C. § 1305; 5 C.F.R. Part 930, Subpart B—Administrative Law Judge Program (2013).

agency must choose an ALJ.⁴⁶ Further, under the federal APA, pay raises are not controlled by the federal agency employing the ALJ, but by the OPM.⁴⁷ Finally, federal ALJs may not be supervised by agency staff with prosecutorial or investigative responsibilities.⁴⁸

Despite precautions to prevent undue influence on the ALJ by the agency, the public remains skeptical. As Bernard Segal, a past president of the ABA, explained:

[There is an] unavoidable appearance of bias when an administrative law judge, attached to an agency, is presiding in litigation by that agency against a private party. One can fill the pages of the United States Code with legislation intended to guarantee the independence of the administrative law judge; but so long as that judge has offices in the same building as the agency staff, so long as the seal of the agency adorns the bench on which that judge sits, so long as that judge's assignment to the case is by the very agency whose actions or contentions that judge is being called on to review, it is extremely difficult, if not impossible, for that judge to convey the image of an impartial fact finder.⁴⁹

Moreover, despite the federal APA's intended separation of federal ALJs from improper agency influences in deciding cases, there have been numerous credible assertions, some supported by judicial findings, that federal agencies have failed to honor the separation provisions and have attempted to interfere with ALJ independence.⁵⁰

⁴⁶ 5 C.F.R. § 930.204.

⁴⁷ 5 C.F.R. § 930.205.

⁴⁸ "The employee who presides at the reception of evidence . . . may not— . . . (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." 5 U.S.C. § 554(d)(2) (2006) (footnote omitted).

⁴⁹ Bernard G. Segal, *The Administrative Law Judge: Thirty Years of Progress and the Road Ahead*, 62 A.B.A. J. 1424, 1426 (1976).

⁵⁰ See *Mahoney v. Donovan*, 721 F.3d 633 (D.C. Cir. 2013). Mahoney was an ALJ for the U.S. Department of Housing and Urban Development (HUD).

Attempts by state agency personnel to intimidate state agency ALJs to decide in favor of the agency have also apparently been quite common.⁵¹

See id. at 634. He alleged among other infractions of the Federal APA that: HUD had assigned cases based on likelihood of favorable ruling for the agency rather than randomly; his superiors had *ex parte* communications with private litigants regarding the management of cases pending on his docket without giving him notice or the opportunity to participate; his superiors had withdrawn staff support in retaliation for his reporting APA violations to federal officials authorized to take action against agency misconduct; and they were notifying the Justice Department of upcoming cases before private parties were notified thereby giving the government an unfair advantage. *See id.* at 634 n.1; *Mahoney v. Donovan*, 824 F. Supp. 2d 49, 52–53 (D.D.C. 2011), *aff'd in part*, 721 F.3d 633 (D.C. Cir. 2013). Federal trial and appellate courts held that ALJ Mahoney lacked standing to raise these issues and that some of them were not timely raised and were barred by limitations. *See also* Debra Cassens Moss, *Judges Under Fire—ALJ Independence at Issue*, A.B.A. J., Nov. 1991, at 56, 56–57 (1991). Department of Interior Chief ALJ McKenna alleged that in retaliation for his testimony to Congress and in a grievance proceeding against the Department of Interior (DOI), his DOI superiors initiated a reduction in force (RIF) action to eliminate his job. *See also* McKenna v. Dept. of the Interior, No. 92-3520, 1993 WL 142069 (Fed. Cir. May 4, 1993). A Merit Systems Protection Board (MSPB) ALJ held a hearing on McKenna's claim. The MSPB ALJ found that ALJ McKenna's immediate superiors had initiated the RIF because they "harbor[ed] animosity" towards McKenna, but this animosity did not invalidate the RIF because the ALJ's superiors did not have authority to carry it out and approval of the action by the Secretary of the Interior was not shown to be motivated by animosity toward McKenna but was permissible as a legitimate reduction in force action. *See id.* at *1–2. This decision was affirmed on appeal. *McKenna v. Dept. of the Interior*, 996 F.2d 1235 (Fed. Cir. 1993); *see also* Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 52, 63–66 (2013) (regarding the actions taken against Social Security ALJs during the Carter administration to intimidate them to rule against recovery by claimants); DONNA PRICE COFER, JUDGES, BUREAUCRATS, AND THE QUESTION OF INDEPENDENCE: A STUDY OF THE SOCIAL SECURITY ADMINISTRATION HEARING PROCESS 182 (Greenwood Press 1985) (reporting that in her 1982 nationwide survey of Social Security ALJs, seventy percent of the respondents reported they had received pressure from the Social Security Administration to deny more claims for recovery against the Social Security trust fund).

⁵¹ *See, e.g.*, Erick Williams, *Off the Record: Michigan's Ex Parte Law Needs Reform*, MICH. B.J., Jan. 2002, at 24 (2002), available at <http://www.michbar.org/journal/pdf/pdf4article387.pdf>. In his article, Erick Williams, a state ALJ, complained of the use of command influence by administrative agency heads at the Michigan Department of Corrections to pressure ALJs to rule in favor of the Department and against those challenging the agency.

V. HISTORICAL PERSPECTIVE: THE MODEL STATE APAS
(MSAPAs)

Unlike the federal APA, which was hammered out amidst turmoil as a compromise between New Dealers and the judicialists (with the ABA on the side of the judicialists), the first MSAPA in 1946 was developed in a far more leisurely manner as a NCCUSL and ABA joint product.⁵² Early drafts were widely circulated to state

See id. at 28–29. In response to Erick Williams’s article, a state assistant attorney general (Assistant AG) argued that a state ALJ is not a real judge. *See* Michael Lockman, *Speaking Out: Off the Record—Michigan’s Ex Parte Law Needs Reform*, MICH. B.J., May 2002, at 48, 48 (quoting *Ass’n of Admin. Law Judges v. Pers. Dir. of State*, 402 N.W.2d 19, 23 (Mich. Ct. App. 1986)). Therefore, the Assistant AG argued, *ex parte* attempts to influence the ALJ’s decision by agency supervisors were not only permissible but, in fact, the agency heads were just doing their jobs in pressuring ALJs to rule for the agency in the individual contested cases that came before them for decision. *See id.* A second commenter also challenged the factual allegations made by Williams. *See id.* at 49; *see also* Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 NAT’L ASS’N ADMIN. L. JUDICIARY 322 (2002) (discussing other cases in which state ALJs were disciplined for ruling against their agencies and in favor of private parties); *see also* Ed Hein, Alaska ALJ, Remarks Before the Alaska State Legislature Joint Committee on Administrative Regulation Review (Feb. 19, 2003), *available at* <http://www.legis.state.ak.us/pdf/23/M/HARR2003-02-190858.PDF>. Mr. Hein testified that,

An inherent conflict always exists when a hearing officer is employed [as an in-house agency employee]. He [or she] has the same supervisor as the person issuing the initial determinations [of violations or denial of an application or permit]. His [or her] supervisor understands that [the ALJ] will disagree with [the initial agency determination and rule against the agency] at times. However, agency administrators are not always that enlightened. [Hein] has heard many stories at national conferences where hearing officers are pressured into changing their decisions. Hearing officers have quotas and cannot side against the [employing] agency too often.

Id. at 13–14.

⁵² *See* Albert S. Abel, *The Double Standard in Administrative Procedure Legislation: Model Act and Federal Act*, 33 IOWA L. REV. 228, 229 (1948) (discussing the differences between the model act and federal act in administrative procedure legislation).

and local bar associations and to academics for comments and suggestions.⁵³ Insofar as has been reported, there were no hotly debated issues in the drafting of the 1946 MSAPA.⁵⁴ Instead, the 1946 APA seems to have been a consensus government reform measure fully supported by both NCCUSL and the ABA.⁵⁵ Its adoption was postponed until after Congress adopted the federal APA to make certain that the MSAPA meshed with the final federal APA.⁵⁶

Although compatible with the federal APA, from the first MSAPA in 1946 to the fourth and most recent MSAPA in 2010, the MSAPAs have never been identical to the federal APA.⁵⁷ Two law review articles comparing the federal APA and the MSAPAs observed that the MSAPAs have only a “cousinly” rather than a more direct family resemblance to the federal APA.⁵⁸ Professor Michael Asimow, an expert in administrative law, has declared that in drafting a state APA, the draftsman should be aware of the provisions of the federal APA, should borrow from those provisions which have worked well, and should avoid provisions which have not worked so well.⁵⁹ Professor Asimow does not contend that the draftsman of a state APA has any obligation to follow the federal APA except insofar as he or she chooses to do so.⁶⁰

⁵³ *Id.*

⁵⁴ *Id.* at 229–33.

⁵⁵ *Id.*

⁵⁶ Bonfield, *supra* note 33, at 298.

⁵⁷ *Id.*

⁵⁸ Abel, *supra* note 52, at 229; Bonfield, *supra* note 33, at 302.

⁵⁹ See Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L. REV. 297, 297 (1996).

⁶⁰ *Id.* Professor Asimow writes:

A reformer who sets out to modernize a state's APA necessarily turns first to . . . the Federal APA. The pathways of that statute are embedded in every administrative lawyer's mental map. If a federal provision seems to have worked well, that provision is the logical starting point in drafting a state law. If the provision has generated major problems in application, that lesson should also be taken to heart.

Dean E. Blythe Stason of the University of Michigan School of Law chaired the MSAPA drafting committees for both the 1946 and the 1961 MSAPAs.⁶¹ Frank E. Cooper assisted in the drafting of the 1961 MSAPA as a staff consultant (probably the same position that the ULC now calls “reporter”—the person who does the actual drafting under the drafting committee’s guidance).⁶² Dean Stason previously worked on the 1941 U.S. Attorney General’s Committee on Administrative Procedure and was part of the three-member coalition filing a minority report.⁶³ Stason helped draft proposed legislation to accompany the minority coalition report.⁶⁴ That draft legislation, with revision, eventually morphed into the federal APA.⁶⁵

VI. THE BENJAMIN REPORT: “CENTRAL PANELS WITHOUT FINAL DECISION AUTHORITY DO NOT GO FAR ENOUGH”; RELATION BETWEEN FACT-FINDING AND POLICY

The earliest reference to the central panel ALJ final decision authority issue is contained in the 1942 Benjamin Report, written by Robert M. Benjamin.⁶⁶ The Benjamin Report was a major influence on the 1946 MSAPA.⁶⁷ It was the first comprehensive study of state administrative law in any jurisdiction, and its suggestions were of value far beyond the State of New York.⁶⁸

Largely forgotten today, Robert M. Benjamin was a distinguished and well-known lawyer in his day.⁶⁹ After service in World War I as an infantry captain, he entered Harvard Law School

Id.

⁶¹ Bonfield, *supra* note 33, at 300.

⁶² See 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW viii (1965).

⁶³ Bonfield, *supra* note 33, at 300.

⁶⁴ COOPER, *supra* note 62, at 6–7.

⁶⁵ *Id.*

⁶⁶ ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK, REPORT TO THE HONORABLE HERBERT H. LEHMAN, GOVERNOR OF THE STATE OF NEW YORK (1942).

⁶⁷ COOPER, *supra* note 62, at 6–7.

⁶⁸ See *id.* at 5 n.5.

⁶⁹ Robert M. Benjamin Dies at 69; Lawyer Served as State Official; Moreland Act Commissioner had Headed Regents Unit—Aided Hiss Appeal, N.Y. TIMES, Jan. 18, 1966, at 33.

and graduated in 1922.⁷⁰ He then clerked for U.S. Supreme Court Justice Oliver Wendell Holmes before entering private law practice.⁷¹ In the later years of his career, he headed the team of appellate lawyers who represented Alger Hiss on his appeal from a perjury conviction for lying to the House Un-American Activities Committee (HUAC) in hearings concerning Hiss's alleged espionage activity.⁷² This was a cause célèbre and the case that first brought HUAC member Richard M. Nixon to national attention.⁷³ In mid-career, Benjamin accepted an appointment by New York Governor Herbert H. Lehman as a special commissioner under New York's Moreland Act to study administrative adjudication in the State of New York.⁷⁴

The prefatory notes for the first and second MSAPAs (the 1946 and 1961 MSAPAs) acknowledge the influence and importance of the Benjamin Report in drafting these model acts.⁷⁵ As already discussed, Frank E. Cooper (the author of a 1965 two-volume treatise on state administrative law) declared the Benjamin Report to be the

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Mr. Benjamin is shown as lead counsel in the court papers. *See, e.g.*, ROBERT M. BENJAMIN, ALGER HISS, PETITIONER, v. UNITED STATES OF AMERICA. U.S. SUPREME COURT TRANSCRIPT OF RECORD WITH SUPPORTING PLEADINGS (Gale 2011), <http://www.amazon.com/Petitioner-America-Transcript-Supporting-Pleadings/dp/1270372238> (last visited Nov. 25, 2013).

⁷³ *See* Jennie Weber, *Nixon and the Alger Hiss Case*, AMERICAN PRESIDENTS BLOG (Dec. 2, 2008), <http://www.american-presidents.org/2008/12/nixon-and-alger-hiss-case.html?m=1>; *see also* Douglas Linder, *The Alger Hiss Trials: An Account*, <http://law2.umkc.edu/faculty/projects/ftrials/hiss/hiss.html> (last visited Nov. 25, 2013).

⁷⁴ *See Robert M. Benjamin Dies at 69, supra* note 69. In addition to the accomplishments listed above, Benjamin served on the Board of Regents of the New York State Educational Department and the Board of Directors of the American Judicature Society. At the time of his death, he was chairman of an ABA special committee on a proposed Code of Federal Administrative Procedure to replace the federal Administrative Procedure Act and was a member of the Board of Directors of the American Bar Foundation. He was also on the Board of Trustees of the Practising Law Institute (PLI). *Id.*

⁷⁵ *See* MODEL STATE ADMIN. PROC. ACT § Ref. & Annos., U.L.A. 175–76 (1961); *see also* MODEL STATE ADMIN. PROC. ACT § Ref. & Annos., U.L.A. 174–76 (1946).

first serious and comprehensive study of state administrative law.⁷⁶ He also compared it favorably to the 1941 *Final Report of the Attorney General's Committee on Administrative Procedure* (Final Report)—the primary study underlying the federal APA.⁷⁷ In a panel discussion celebrating the 40th anniversary of the federal APA, Walter Gellhorn, who headed the staff that produced the 1941 Final Report, brought up Benjamin's name and the Benjamin Report and acknowledged the parallels between the Final Report and the Benjamin Report.⁷⁸

The Benjamin Report consists of six volumes.⁷⁹ Its focus is on administrative adjudication as conducted in New York at the time that Benjamin and his assistants conducted the study and wrote the report (roughly 1939–1942).⁸⁰ Five of the volumes describe and analyze the adjudication procedures employed by each of the major New York state agencies.⁸¹ The sixth volume is unnumbered and is a summary volume containing Benjamin's recommendations on how state administrative adjudication could be improved.⁸²

In the Benjamin Report's summary volume, Benjamin discusses the concepts of final decision authority for central panels.⁸³ None of these central panels were yet in existence—anywhere—and the name “central panel” had not yet been coined. Nonetheless, Benjamin considered and discussed the central panel concept and final decision authority. Benjamin said that if such panels were created, they should be given final decision authority.⁸⁴ Benjamin reached this conclusion through the following logic:

⁷⁶ See *supra* note 68 and accompanying text.

⁷⁷ See COOPER, *supra* note 62, at 10.

⁷⁸ Walter Gellhorn, Kenneth Culp Davis, & Paul Verkuil, *Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 516 (1986).

⁷⁹ Reprinted in three cloth bound volumes by William S. Hein and Co. (2001), available at <http://www.lawbookexchange.com/pages/books/32150/robert-m-benjamin/administrative-adjudication-in-the-state-of-new-york-6-vols>.

⁸⁰ Benjamin was appointed in 1939 and published the report in 1942.

BENJAMIN, *supra* note 66.

⁸¹ *Id.* at 65–66.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

Another suggestion, with which I disagree, calls for brief mention. The suggestion is that all hearings be conducted by trial examiners appointed by, and subject to removal only by, some agency independent of . . . [the agency litigating with the private citizen or company]. If the decisions of such independent trial examiners were, as is sometimes suggested, given finality (subject only to judicial review), the change would be not merely a change in internal organization; the trial examiners would constitute an independent adjudicating agency If, on the other hand, the decisions of such trial examiners were not given finality, the change in internal organization would not go far enough towards accomplishing the purpose of a separation of functions. The existence of . . . [the head of the litigating agency's] ultimate power to review and reverse would, even if it were not frequently exercised, tend to impair the confidence in impartial adjudication which it is a primary purpose of the separation of functions to foster. In any case where . . . [the agency litigating with the private citizen or company] actually reversed a decision of the trial examiner favorable to the respondent, the very fact of the trial examiner's independence would aggravate the objection to the [head of the litigating agency's] duality of function.⁸⁵

Benjamin was not alone in this line of argument. An unpublished essay by Allen C. Hoberg, Director of the North Dakota Central Panel, contains reasoning parallel to Benjamin's reasoning.⁸⁶ Hoberg writes:

⁸⁵ *Id.*

⁸⁶ Allen C. Hoberg, Final Decision Making By Hearing Officers 1-2 (unpublished memorandum) (Dec. 11, 2003) (on file with author). Hoberg is the longtime director of the North Dakota Central Panel. He wrote this memorandum at the request of the Advisory Committee to the North Dakota Office of Administrative Hearings and made it available to me to use in writing this paper.

The appearance of fairness should extend not only to the decision maker in the first instance (at the hearing and recommended decision stage) but also to the final decision stage. Certainly, it is beneficial and appears to be fair, to have a hearing conducted by, and the recommended decision issued by, an independent HO. Yet, that appearance of fairness can be compromised when the final decision maker is the agency head [of the agency litigating against the private citizen].⁸⁷

Law review articles arguing in favor of agency head authority to overturn the ALJ fact-findings often argue that the agency heads need final decision authority to make certain the ALJ correctly applies agency policy to the facts of each case.⁸⁸ However, the Benjamin Report makes an observation that these critics have failed to address. Benjamin writes:

There are many matters within the scope of agency adjudication in which policy plays a proper, and often a necessary, part. It may play such a part in interpreting a statute which the administrator is charged with enforcing, or in determining the penalty that should be imposed for a particular offense, or in determining the course of action that the administrator should follow, or require to be followed, on the basis of facts properly found. But policy should play no part in the decision of questions of fact; policy, rightly understood, cannot call for the decision of a question of fact in a particular way.

To illustrate: The State Liquor Authority may properly take the policy of the statute into account in specifying the kinds of action by a manufacturer or wholesaler that constitute a gift or service to a retail licensee tending to influence such licensee to purchase the product of the manufacturer or wholesaler, in violation of Section 101 of the Alcoholic Beverage

⁸⁷ *Id.*

⁸⁸ *See infra* Part X.

Control Law. But policy has no proper place in a determination of whether a particular manufacturer or wholesaler has *in fact* been guilty of that kind of action. Once a violation has been found to exist in fact, policy may again come into play in determining the penalty.

The distinction that I suggest has not always been clear in the minds of administrative judges. It is my hope that this report will make it so. If this distinction is kept in mind in administrative adjudication, much will have been done to meet whatever problem now exists. The administrative judge must still, however, understand that even when policy plays a proper part it should be applied with the fair-minded deliberation that characterizes responsible adjudication⁸⁹

Retired Oregon Supreme Court Justice W. Michael Gillette made this same point more succinctly, saying, “The facts are whatever they are, and the legal consequences that flow from them flow only from them after we decide what the facts are. The facts are not what they are because the law is what it is; the facts are what they are, period.”⁹⁰

One of the early reviewers of this article took issue with Justice Gillette’s “facts are the facts” point. He wrote:

I think that’s far too simplistic—what ALJ’s decide are not the actual facts, but their inference about what the facts are based on particular evidence and testimony provided in the proceeding. Presumptions are important in addressing uncertainties about what the facts actually are and involve policy consideration, namely which side do we want to err on (knowing that

⁸⁹ BENJAMIN, *supra* note 66, at 22–24.

⁹⁰ W. Michael Gillette, *Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?*, 20 J. NAT’L ASS’N ADMIN. L. JUDICIARY 95, 115 (2000).

uncertainty and error are an inevitable part of any fact finding).

To this, my response is that the same comment could be made about the entire common law adjudication system—all “facts” are the fact finder’s interpretation of testimony, documents, and other admissible evidence, whether the fact finder is a general jurisdiction judge, jury, an ALJ, or an agency head. But how fair is it for one of the litigants—instead of the neutral presiding officer in the case—to determine what the facts of the case actually are? That is the point to be decided. The ancient maxim “*nemo iudex in causa sua*,” translated as “no person should be a judge in their own cause,” is applicable here and supports the transfer of final decision authority on fact-findings to the neutral central panel ALJ.

VII. AGENCY HEAD AUTHORITY TO OVERRULE ALJ FACT FINDINGS—WHERE DID THIS AUTHORITY ORIGINATE AND WHAT ARGUMENTS SUPPORT IT?

In extensive reading on the final decision by central panel ALJs issue, I have yet to find any attempt to logically justify the conclusion that the head of an agency involved in the adjudication should be able to overrule ALJ fact-findings. The agency head, as one of the litigants, has a built-in conflict of interest and has not had the ALJ’s opportunity to observe and question the witnesses to clarify their testimony.⁹¹

⁹¹ See *Iran Air v. Kugelman*, 996 F.2d 1253, 1261 (D.C. Cir. 1993) (examining “the incongruity of allowing an agency official who has seen only the paper record to substitute his judgment for that of an adjudicatory officer ‘with independent status, who saw the witnesses’ demeanor and gauged their truthfulness.’”) (citing *Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988)). Michael Asimow has commented on related issues. Under the then existing California APA,

An agency that is dissatisfied with a proposed decision simply rejects it and makes its own determinations of fact, law, and policy from the cold record. Since agency heads are frequently part-time appointees who have little time to give to their agency responsibilities, the actual determination of rejection (and the preparation of a new opinion) is done by agency staff. This

The primary support for the conclusion that the head of an agency involved in the adjudication should be able to overrule ALJ fact-findings seems to be “that is the way we have always done it.” At the federal level, the federal APA gives agency heads the authority to overrule ALJ fact-findings.⁹² At both the federal and state levels, the agency heads have likewise always had this authority when the ALJ was an in-house agency employee. All too often, this is treated as the end of the discussion about whether or not such practice makes much sense in states which have adopted the central panel model.

cavalier treatment of proposed decisions sharply detracts from the vitally important function of administrative judges as a check on the possible institutional bias of the agency heads or staff.

....

... [P]ersons who have engaged in a hearing before a judge resent a substitution of credibility findings by agency heads who never heard the witnesses testify. Such persons tend to be more trusting of administrative judges who are relatively independent and insulated from contact with adversary staff members. Moreover, efficiency is served by giving greater finality to the judge's findings rather than encouraging agency heads to reject the judge's findings and substitute their own. Finally, I believe that a judge who has lived with a case, often for days or weeks, and heard and saw all of the witnesses, is more likely to reach accurate credibility findings than are persons whose only contact with the case is a relatively brief exposure to a written transcript.

See Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1115 (1992) (footnote omitted); see also FRANK E. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 155 (William S. Hein & Co. 1951), which comments in part as follows, with regard to what Mr. Cooper sees as a “problem inherent in the very nature of administrative tribunals”:

Charged as they are with responsibility for the advancement of a particular public policy, their desire to enforce that policy renders it difficult for them to appraise with impassive objectivity the evidence adduced at the hearing. Their special experience and conviction may lead them to find claims clearly established on a record which would leave a disinterested judge in doubt.

⁹² See Federal Administrative Procedure Act, 5 U.S.C. § 557(b) (2012).

States that have adopted the central panel model have a choice. They can grant authority over the final fact-finding to the head of the litigating agency or to the independent central panel ALJ.⁹³ This option did not exist under the traditional adjudication model in which the ALJ was an agency employee.⁹⁴ Professor Flanagan explains the choice available with the creation of central panels, writing, in part:

Before central panels, administrative adjudication was clearly the sole province of the agency. The contested case took place at the agency and fact-finding by the ALJ was a preliminary step to the agency's rendering the final decision. Neither the process nor an APA accorded the findings of the ALJ special status, and proposed decisions by ALJs were clearly subject to review and amendment by the agency. With central panels, adjudication becomes a two-step process with fact-finding now taking place before a trained adjudicator outside the agency who renders a preliminary decision. Agency review follows as a separate and distinctive step in which the case returns to the agency for another decision. From the participant's point of view, an agency that does not adopt the ALJ's decision favoring the litigant is biased, and if the agency affirms the ALJ's decision, its decision is irrelevant, and the [agency head review] process [is] time consuming, and expensive. The creation of the central panel has transferred the focus of adjudication from the final agency decision to the fact-finding by the ALJ, and enhanced the latter's importance and status.⁹⁵

⁹³ See, e.g., Flanagan, *An Update*, *supra* note 3.

⁹⁴ See *id.* at 422–23.

⁹⁵ *Id.*

VIII. STATES NOT REQUIRED TO FOLLOW THE FEDERAL APA AND
THE U.S. SUPREME COURT'S INTERPRETATION OF THE FEDERAL APA
IN THE *UNIVERSAL CAMERA* DECISION

In drafting their individual APAs, the states are free to follow the “laboratories of democracy” theory.⁹⁶ They are not bound by the federal APA except insofar as they choose to adopt its provisions or, perhaps, insofar as some provisions in the federal APA may be constitutionally required by due process concerns.⁹⁷ In fact, most states have patterned their APAs on one or more of the MSAPAs rather than on the federal APA.⁹⁸

Under the federal APA, the agency head (or his or her designated review panel or official exercising authority delegated by the agency head) may overrule both ALJ findings of fact and conclusions of law.⁹⁹ This is as required by the language of the federal APA (5 U.S.C. § 557(b)) and the U.S. Supreme Court's decision in *Universal Camera Corp. v. NLRB*.¹⁰⁰ Section 557(b) states in pertinent part that, “On appeal from or review of the initial

⁹⁶ Justice Louis Brandeis popularized the laboratories of democracy metaphor. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). The metaphor means that, except as limited by the U.S. Constitution or a state's own constitution, a state or local government may enact such legislation as its legislative body considers appropriate and act as experimental labs for legislation that other states and the federal government might later wish to emulate. The theory has been quoted with approval in many Supreme Court cases over the years since Justice Brandeis first introduced it. See, e.g., *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980).

⁹⁷ For a discussion of due process issues affecting administrative cases, and the differences between the federal APA and state approaches in this regard, see Arthur Earl Bonfield, *supra* note 33, at 323 n.107.

⁹⁸ See *id.* at 297.

⁹⁹ See *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (“Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law.”); see also Federal Administrative Procedure Act, 5 U.S.C. § 557(b) (2012).

¹⁰⁰ 5 U.S.C. § 557(b); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

decision, the agency has all the powers which it would have in making the initial decision”¹⁰¹

In *Universal Camera*, the Supreme Court held that the quoted statutory language allows an agency head subject to the federal APA to overrule ALJ fact-findings even if the ALJ’s findings are based on credibility of the witnesses which the agency head has not had the opportunity to observe.¹⁰²

This rule in *Universal Camera* is the opposite of the rule normally applied when appellate courts review fact-findings of lower courts. Normally, the appellate court defers to the lower court’s fact-findings since the appellate court did not have the lower court’s opportunity to observe witness demeanor.¹⁰³

¹⁰¹ 5 U.S.C. § 557(b).

¹⁰² See *Universal Camera*, 340 U.S. at 495–96.

¹⁰³ The Task Force on Legal Services and Procedure of the Second Hoover Commission on Organization of the Executive Branch of the Government (1953) recommended that, in review of ALJ decisions, the federal agencies be limited to the same type of fact review that the appellate courts exercise over lower court fact-findings, but its recommendations were not adopted. See JOANNA L. GRISINGER, *THE UNWIELDY ADMINISTRATIVE STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 216 (2012) (“The decisions of hearing commissioners were . . . to have as much authority as the decisions of trial courts when reviewed by federal appellate courts. Hearing commissioners’ findings of fact would be final unless the agency on review determined that the findings were clearly erroneous.”). If this recommendation of the Task Force had been enacted, federal law with regard to agency authority over fact-findings would have been the same as advocates of final fact-finding for central panel ALJs claim it should be in the central panel jurisdictions. In accord with the Task Force, Bernard Schwartz, author of a popular treatise on administrative law, wrote:

[Federal agency review of ALJ fact findings] should be eliminated by a statute limiting the agency on appeals from ALJ decisions to appellate power. Congress could accomplish this by removing from . . . the APA the provision: “On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision.” In its place, there should be a provision that, on review of an ALJ initial decision, the agency shall have only the powers of review that a court has upon judicial review of the agency’s decisions.

Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L.J. 203, 218 (1996) (footnote omitted).

Under *Universal Camera*, the agency head or agency review authority must explain why it is overruling ALJ fact-findings.¹⁰⁴ Furthermore, the ALJ's fact-findings to the contrary of those made by the agency remain part of the record on review.¹⁰⁵ Stated another way, reviewing courts weigh the ALJ's findings against the agency's findings to determine what weight to give the agency fact-findings and whether the agency head findings are supported by substantial evidence.¹⁰⁶ But under the federal APA and the *Universal Camera* decision, the agency head (or agency review authority) fact-findings, *not* the fact-findings of the ALJ, are considered presumptively correct by the appellate reviewing court.¹⁰⁷

The *Universal Camera* decision is not based on an interpretation of the U.S. Constitution. It is based instead on an interpretation of the language of the federal APA.¹⁰⁸ Therefore, it is not binding on the states unless they independently choose to adopt it. The federal APA does not govern central panel adjudications. Each state and local central panel jurisdiction is instead governed by a separate statute or ordinance, which does not necessarily follow the federal APA on the issue of agency head authority to overrule ALJ fact-findings.

IX. CONSTITUTIONALITY OF DELEGATING FINAL DECISION AUTHORITY TO CENTRAL PANEL ALJS

It is black letter law that an administrative agency is a creature of statute (or sometimes of a constitutional provision).¹⁰⁹ An administrative agency has no inherent authority other than what the drafters of the statute or the framers of the constitution have given

¹⁰⁴ See *Universal Camera*, 340 U.S. at 494.

¹⁰⁵ See *id.* at 493.

¹⁰⁶ See *id.* at 496.

¹⁰⁷ One of the early reviewers of this article argues that *Universal Camera* in effect requires federal agency heads to defer to all ALJ fact-findings based on credibility determinations. A number of lower federal courts initially thought that, but the Supreme Court itself has rejected that interpretation of its *Universal Camera* decision. See *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364 (1955).

¹⁰⁸ See *Universal Camera*, 340 U.S. at 487–96.

¹⁰⁹ 73 C.J.S. *Public Administrative Law and Procedure* § 12 (2004).

it.¹¹⁰ It may exercise only those powers expressly granted by statutory or constitutional provision together with those powers necessarily implied by the powers it is expressly granted.¹¹¹ An agency may not improvise upon its express powers so as to confer authority on itself indirectly that it has not been granted either expressly or by necessary implication.¹¹²

In those states which have adopted central panel ALJ final decision authority, the legislatures have made the decision to change the regulatory scheme from the traditional one in which the agency makes the final decision and the ALJ only makes a recommendation. By definition, to the extent that a state legislature has transferred final decision authority from the agency to the central panel ALJ, it has created an exception to the agency's traditional authority. Unless there is some provision in the state or federal constitution prohibiting the legislature from doing what it enacts legislation to accomplish, the legislation will stand as part of state law. Unlike Congress, which has authority to exercise only delegated powers expressly granted under the U.S. Constitution or arising by necessary implication from the powers expressly granted, state legislatures have plenary legislative power to enact all legislation except as their plenary power has been limited either expressly or by necessary implication by the state or federal constitutions.¹¹³

¹¹⁰ *Id.* § 107.

¹¹¹ *See id.*

¹¹² *See id.* § 109.

¹¹³ *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 15–16 (1998); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 173–74 (The Lawbook Exch., Ltd. 1999) (1868) [hereinafter COOLEY ON CONSTITUTIONAL LIMITATIONS] (“Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited.”). COOLEY ON CONSTITUTIONAL LIMITATIONS is the classic comparative work on state constitutions. Originally published in 1868, it went through seven updated editions by 1903. After being out-of-print for many years, this book was reprinted by The Lawbook Exchange, Ltd., in 1999 and again in 2011. It compares the many state constitutions with one another and with the federal Constitution. Some of it is now out-of-date due to developments since Cooley originally wrote the book, but its basic premises are still applicable to modern day comparative analysis of state constitutions. Its author, Thomas M. Cooley, was the first dean of the University of Michigan Law School, a Chief

Wooley v. State Farm Fire & Casualty, a Louisiana case, is the most widely cited case discussing the constitutionality of ALJ final decision authority.¹¹⁴

Justice of the Michigan Supreme Court, the first head of the Interstate Commerce Commission, and a president of the ABA. William J. Fleener, Jr., *Michigan Lawyers in History—Thomas McIntyre Cooley: Michigan's Most Influential Lawyer*, St. B. MICH., <http://www.michbar.org/journal/article.cfm?articleID=53&volumeID=3> (last visited Nov. 7, 2013). There is an accredited law school named in his honor based at Lansing, Michigan, with other campuses at Ann Arbor, Michigan; Auburn Hills, Michigan; Grand Rapids, Michigan; and Tampa Bay, Florida. See *Accreditation*, THOMAS M. COOLEY L. SCH., <http://www.cooley.edu/about/accreditation.html> (last visited Nov. 7, 2013).

¹¹⁴ There are two earlier, less publicized state court decisions upholding the constitutionality of final decision authority for state central panel ALJs under constitutions of their states. See Rossi, *Final Orders on Appeal*, *supra* note 3, at 10. Rossi writes in part, “At least one state, Florida, has held that final authority by an ALJ located in a central panel does not violate state separation of powers doctrine.” *Id.* Rossi identifies *Florida Department of State v. Stevens*, 344 So. 2d 290 (Fla. Dist. Ct. App. 1977), as that case. *Id.* at 11. Rossi’s comment that the court was not presented with and hence did not consider some of the strongest arguments against constitutionality is immaterial. The court decided the issue notwithstanding that Rossi believes he has stronger arguments than the one the court actually ruled on. The court decision will stand as the law of the state of Florida unless it is overruled in a later case. See also MARY SHUPING, N.C. GEN. ASSEM. RESEARCH DIV., CONTESTED CASES UNDER ARTICLE 3 OF THE APA: BACKGROUND INFORMATION & OPINIONS ON THE CONSTITUTIONALITY OF OAH FINAL DECISION-MAKING AUTHORITY 11–50 (2000). As part of the material she assembled in this document, Ms. Shuping includes a legal opinion by North Carolina General Assembly Staff Attorney Karen Cochrane Brown. *Id.* at 14. Ms. Brown’s opinion, *The Constitutionality of House Bill 968*, reads in part, “[T]he precise question . . . [concerning the constitutionality of delegating final decision authority to a central panel ALJ without agency review subject to an appeal to the courts] has been definitively answered by the [North Carolina] Court of Appeals.” *Id.* at 16. Ms. Brown cites *Employment Security Commission of North Carolina v. Peace*, 493 S.E.2d 466 (N.C. Ct. App. 1997), as the court of appeals case that decided the issue. The North Carolina Supreme Court dismissed this constitutional issue as a discretionary appeal issue on which the North Carolina Supreme Court had improvidently granted the appeal. The North Carolina Supreme Court did not hold that the North Carolina Court of Appeals was without jurisdiction to rule on the constitutional issue. Further, the court of appeals ruled on the issue in its opinion in *Employment Security Commission*, 493 S.E.2d at 470–71. When a higher court dismisses an appeal on non-substantive grounds, the decision of the lower court (here the court of appeals) stands. I agree with Professor Rossi and Ms. Brown’s reading of these two cases as deciding the final decision authority

The Louisiana Supreme Court was relatively straightforward in its treatment of constitutional issues in *Wooley*.¹¹⁵ *Wooley* holds that: (1) no specific powers or authority are granted to or conferred on the Insurance Commissioner by the Louisiana constitution; and, therefore, (2) the Louisiana legislature could freely transfer final decision authority in an agency adjudication from one executive branch agency (the Louisiana Insurance Commissioner) to another executive branch agency (the Louisiana Central Panel).¹¹⁶

Wooley strongly suggests that the legislation would have been unconstitutional if: (3) the Louisiana constitution had conferred specific authority on the Insurance Commissioner (which it did not); and (4) the Louisiana legislature had enacted legislation purporting to transfer a portion of the authority conferred on the Insurance Commissioner by the Louisiana constitution to the central panel ALJ (which the *Wooley* court determined that the legislature did not do).¹¹⁷

In *Wooley*, the Louisiana Supreme Court was not suggesting a statute transferring final decision authority away from a line agency to a central panel ALJ would violate the constitutionally required separation of powers except as indicated in paragraphs (3) and (4) above.

There are several law review articles which speculate about the possibility that a state court might find that transferring final decision authority from a line agency to a central panel ALJ would be unconstitutional as an intrusion on “core executive branch functions” of the executive.¹¹⁸ However, none of these articles clearly articulates the reasoning behind this speculation.

constitutional issue in the states of Florida and North Carolina unless and until the cases are overturned.

¹¹⁵ See *Wooley v. State Farm Fire & Cas. Ins. Co.*, 893 So. 2d. 746, 761–72 (La. 2005).

¹¹⁶ See *id.* at 767–68.

¹¹⁷ See *id.*

¹¹⁸ See Jay S. Bybee, *supra* note 32, at 462–63; Flanagan, *Redefining the Role*, *supra* note 3, at 1410–11; Rossi, *Final Orders On Appeal*, *supra* note 3, at 2 (“Although there are many benefits to ALJ finality . . . it also risks undermining core executive branch functions and thwarting accountability norms.”); Moliterno, *supra* note 3, at 1227 n.181.

Professors James F. Flanagan and Jim Rossi have been two of the leading proponents of retaining final decision authority in the agency instead of allowing all or part of it to be exercised by central panel ALJs. As stated earlier, the late John Hardwicke was the first chief ALJ and director of the Maryland OAH.¹¹⁹ He was also the first executive director of NAALJ and was a leading proponent of central panel authority. In a debate between Judge Hardwicke and Professors Flanagan and Rossi at the 2004 annual meeting of the ABA in Atlanta, Georgia on the final decision issue (in which Professors Flanagan and Rossi were presumably marshaling their strongest arguments) neither Professor Rossi nor Professor Flanagan brought up the issue of the possible unconstitutionality of ALJ final decision authority.¹²⁰ In his article, *Final, but Often Fallible: Recognizing Problems with ALJ Finality*, Professor Rossi alludes to the constitutional argument, but then concedes that legislation transferring final decision authority to central panel ALJs could be drafted to avoid any constitutional problem.¹²¹

Key to the constitutional arguments is the notion of separate branches of government. Although invasion of the core functions of the three branches of government is at least a theoretical problem in state administrative law, the doctrine has not been well developed in interpretation of state constitutions.¹²² It has been developed most coherently at the federal level.¹²³

One of the better articles to discuss the required separation of core functions of the executive, legislative, and judicial branches in federal administrative agencies is *Presidential Administration* by

¹¹⁹ See *supra* note *.

¹²⁰ See Jim Flanagan, Jim Rossi, John Hardwicke, & Tyrone T. Butler, *NCALJ Panel Discussion: ALJ Decisions—Final or Fallible?*, 25 J. NAT'L ASS'N ADMIN. L. JUDICIARY 191 (2005). This debate took place in the Georgia Office of State Administrative Hearings during the 2004 ABA meeting in Atlanta, Georgia. See *id.* at 191.

¹²¹ Rossi, *Final, but Often Fallible*, *supra* note 3, at 64.

¹²² For articles on the doctrine under state law, see Johnny C. Burris, *The Administrative Process and Constitutional Principles: Separation of Powers*, 75 FLA. B. J. 28 (2012); David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655 (2011); and Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337 (1990).

¹²³ See *infra* notes 124–130 and accompanying text.

Associate Justice Elena Kagan of the U.S. Supreme Court.¹²⁴ Justice Kagan wrote the article as a visiting professor at Harvard Law School following her service under President Bill Clinton as Associate General Counsel, then as a Deputy Assistant for Domestic Policy, and Deputy Director of the Domestic Policy Council.¹²⁵ Although she sees a definite role for the President in the supervision and direction of federal agencies in rulemaking, she does not view the President's core authority as including any right to intervene in administrative adjudication.¹²⁶ Justice Kagan explained:

[My] analysis with respect to adjudications, however, is fundamentally different [from her analysis of presidential authority to direct agency rulemaking], reflecting the different nature of these administrative proceedings and the different purposes of participation in them. The famous, now always paired cases of *Londoner v. Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization* drew the constitutional line of division, requiring notice and a hearing as a matter of due process when an administrative authority resolves disputes involving particular and identifiable parties, but not when it adopts rules of general application. The APA maintained the distinction, imposing much stricter procedural requirements on agencies when they act through adjudicative than through rulemaking processes. . . . [T]he greater impetus behind the distinction comes from a sense that the participation of an affected party serves special values in adjudicative proceedings . . . [I]n these proceedings, which apply to and affect discrete individuals and firms, participation not only provides needed information to the decision maker, but also ensures fundamental fairness and protection

¹²⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹²⁵ See *id.* at 2246 n.*; see also *Biography of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 21, 2013).

¹²⁶ See Kagan, *supra* note 124, at 2306, 2362–63.

against abuse, and thereby promotes the acceptability of decisions.

In this context, presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies. . . . [As] the Supreme Court stated in *Myers v. United States*: “there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.” . . . The consequence here is to disallow the President from disrupting or displacing the procedural, participatory requirements associated with agency adjudication¹²⁷

A recent law review article by Professor Jamelle C. Sharp says that, similarly, Congress is strictly prohibited from interfering with individual cases undergoing agency adjudication.¹²⁸

The same points made by Justice Kagan and Professor Sharpe are also made by Charles H. Koch:

[P]olitical actors have a role in the administrative process. To a large extent the role is legitimate and positive. However, there are some limits on the amount and kind of influence which will be permissible. In agency adjudications of individual cases or controversies where the agency is performing its “judicial” or “quasi-judicial” role, influence from the legislative or executive branch is considered

¹²⁷ *Id.* at 2362–63 (alteration in original) (footnotes omitted) (citing *Londoner v. Denver*, 210 U.S. 373 (1908); *Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Meyers v. United States*, 272 U.S. 52 (1926)).

¹²⁸ Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 198 (2013).

improper because it threatens procedural rights of the individual litigants.¹²⁹

Quasi-judicial administrative adjudications are thus not subject to control by either the executive or legislative branches of government.¹³⁰

A student article by Asher P. Spiller expresses the view that final decision authority for the North Carolina central panel violates the state constitution.¹³¹ Its analysis conflicts with the one presented here. Spiller argues that the legislature, after making an agency responsible for regulation of a particular subject, could not constitutionally limit the agency's authority to adjudicate regulatory issues.¹³² I did not find the argument convincing.

My own experience in Texas is relevant here. During the early part of my career, I served for eight years on the Texas Attorney General's staff as an Assistant Attorney General where, among other duties, I sometimes wrote memos or attorney general opinions on the constitutionality of actual or proposed state legislation. I followed this employment with five years as an Assistant General Counsel to the Governor (where I continued to review the constitutionality of legislation to avoid constitutional problems or for possible exercise of the Governor's veto authority). I then spent approximately three years as General Counsel to the Texas Comptroller of Public Accounts (where I still worked with state constitutional issues) and a year as chief legal advisor to the Texas Public Utility Commission. In these positions, I acquired a good basic understanding of the Texas Constitution and of how the Texas Governor relates to Texas state agencies and vice versa.

¹²⁹ CHARLES H. KOCH, JR., 2 ADMINISTRATIVE LAW AND PRACTICE 400 (3d ed. 2010).

¹³⁰ See *id.* On this same point and in agreement with the authorities cited above, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622–23 (1984); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 982 (1980).

¹³¹ Asher P. Spiller, *The Folly in Finality: The Constitutionality of ALJ Final Decision-Making Authority in North Carolina*, 90 N.C. L. REV. 2162 (2012).

¹³² See *id.* at 2182.

The Governor of Texas is chief executive of the State of Texas,¹³³ but since Texas has a plural executive branch (including several statewide separately elected executive branch officials such as the Lieutenant Governor, the Attorney General, the Comptroller Of Public Accounts, the Commissioner of the General Land Office, the Commissioner of Agriculture, and three individually elected members of the Railroad Commission),¹³⁴ the Texas Governor cannot in fact or in theory claim the power over administrative agencies that is sometimes claimed for the President of the United States under the so-called unitary executive theory.¹³⁵ Quite clearly, Texas, with so many separately elected executive officials, has a plural, rather than a unitary, executive.¹³⁶ I cannot imagine a Texas court holding that a statute was unconstitutional because it deprived a Texas governor of quasi-judicial authority by transferring final adjudicative decision authority to a central panel ALJ. I cannot imagine a Texas governor even raising that contention. If it were raised, I am confident the Texas courts would hold that quasi-judicial authority is not part of the Texas governor's "core functions." While the regulatory agencies are located in the executive branch of state government, the adjudicatory functions of the agencies operate *independently* of both the governor and the legislature.

¹³³ See TEXAS POLITICS: THE GOVERNOR OF TEXAS, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_2_0.html (last visited Nov. 9, 2013).

¹³⁴ See TEXAS POLITICS: THE PLURAL EXECUTIVE, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_0.html (last visited Nov. 9, 2013); TEXAS POLITICS: ATTORNEY GENERAL, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_3.html (last visited Nov. 9, 2013); TEXAS POLITICS: COMPTROLLER OF PUBLIC ACCOUNTS, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_4.html (last visited Nov. 9, 2013); TEXAS POLITICS: COMMISSIONER OF THE GENERAL LAND OFFICE, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_5.html (last visited Nov. 9, 2013); TEXAS POLITICS: COMMISSIONER OF AGRICULTURE, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_6.html (last visited Nov. 9, 2013); TEXAS POLITICS: RAILROAD COMMISSION, U. TEX. AUSTIN, http://texaspolitics.laits.utexas.edu/1_9_8.html (last visited Nov. 9, 2013); *see also* TEX. CONST. art. IV.

¹³⁵ See TEXAS POLITICS: THE PLURAL EXECUTIVE, *supra* note 134 (describing the limitations of the plural executive).

¹³⁶ See F. Scott McCown, Executive Orders and the Powers of the Texas Governor, Discussion at the 2nd Annual Advanced Texas Administrative Law Seminar (Aug. 30, 2007).

While one has to be careful in assuming that all fifty state constitutions are alike in most of their provisions, the separation of powers into three separate coordinate branches of government is basic to the federal and to all state constitutions.¹³⁷ Until shown the contrary, the reader should assume that all fifty states would prohibit their governors from directly exercising executive authority to control the outcome of individual adjudications. Thus, there would be nothing that a governor could properly complain had been taken away from the powers of his or her office if final decision-making in the adjudicative functions of administrative agencies were transferred from the line agencies to central panel ALJs. The transfer could not take place, of course, should it infringe on any constitutional authority expressly granted to individual agencies.

Again, to draw an analogy with federal agency adjudications, on numerous occasions Congress has placed final decision authority in a separate adjudicatory agency ALJ or in a court, instead of in the administrative agency having primary jurisdiction to regulate the subject matter involved in the adjudication.¹³⁸ For a comprehensive discussion of the situations in which this has occurred, see Daniel J. Gifford's article, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*.¹³⁹

¹³⁷ See U.S. CONST. art. I, II, III; see also DANIEL L. GRANT & H.C. NIXON, *STATE AND LOCAL GOVERNMENT IN AMERICA* 144 (3d ed. 1975) ("Every state constitution provides for a framework of government. In general or specific terms, it outlines three branches of government: legislative, executive, and judicial.").

¹³⁸ See Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1990–1991).

¹³⁹ See *id.* Gifford gives as examples, the Board of Tax Appeals, the Occupational Safety and Health Review Commission, and the Federal Mine Safety and Health Review Commission. *Id.* at 982, 974–75, 1000–03, 1001. See also the Black Lung Benefits Act, 30 U.S.C. §§ 901–945, which departs from the usual APA pattern without transferring the ALJ position to a separate agency. In *Zimmerman v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 871 F.2d 564, 566–67 (6th Cir. 1989) (citations omitted), the court commented on this as follows:

We note in passing that our reviewing function is quite different under the Black Lung Benefits Act than it is under the Social Security Act. . . . The statutory scheme under the Black Lung Benefits Act is quite different, for here Congress has

Professor Gifford writes that in certain federal agencies (generally described as “mass-justice agenc[ies]”)—those with voluminous caseloads in which decisions are based primarily on factual rather than legal or policy determinations—it is physically impossible for the agency head to make the final decision in individual cases.¹⁴⁰ In those agencies, the agency head instead sets policy for the cases through rulemaking.¹⁴¹ This leaves the final decision to the ALJ, who decides the facts without agency review.¹⁴² The agency is only a litigant without any role in controlling the result in individual cases.¹⁴³ Professor Gifford says this structure has existed in some federal agencies for many years—primarily in benefit-granting agencies, but also in some regulatory agencies.¹⁴⁴ These non-traditional arrangements are sometimes referred to as “split-enforcement model adjudication.”¹⁴⁵

Academicians have sometimes criticized the way these non-traditional arrangements are structured,¹⁴⁶ but I have not located any

expressly placed the power to make conclusive findings of fact with the ALJ, and limited the Board’s function to determining whether the ALJ’s findings are supported by substantial evidence. Under this scheme we are to defer to the ALJ, not to the Board.

¹⁴⁰ See Gifford, *supra* note 138, at 997–98.

¹⁴¹ See *id.* at 998.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ *Id.* at 988–92, 997.

¹⁴⁵ See *id.* at 1000 n.104 (citing George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN L. REV. 315 (1987)); see also George Robert Johnson, Jr., *Background Report for Recommendation 86-4—The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 293 (1986).

¹⁴⁶ See, e.g., ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 19 (1986). This recommendation reads in part:

An Administrative Conference study of the experience with the “split-enforcement model” . . . was unable to conclude whether this model achieves greater fairness in adjudication than does the traditional structural model. Fairness is an important but an unquantifiable and subjective value. Therefore, the Conference

arguments in law journals or elsewhere that the above arrangements are unconstitutional either as an infringement on the core powers of the President or Congress or that they are unconstitutional for other reasons.

If the federal government can withhold final decision authority from federal agencies and place it either in separate administrative adjudicatory agencies or in ALJs, without raising valid constitutional concerns about infringement on the core authority of either the President or Congress (as it has done on numerous occasions), it is more than reasonable to assume that the states can do likewise.

X. ARTICLES ADVOCATING THAT CENTRAL PANEL ALJS MAKE ONLY A RECOMMENDED DECISION, WITH THE AGENCY HEAD MAKING THE FINAL DECISION ON BOTH FACTS AND LAW

The most widely cited articles touching on the topic of final decision authority for central panel ALJs are James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*¹⁴⁷ (cited 43 times); James E. Moliterno, *The Administrative Judiciary's Independence Myth*¹⁴⁸ (cited 29 times); and Jim Rossi, *Final, but Often Fallible: Recognizing Problems with*

takes no position on whether the split-enforcement model is preferable to a structure in which responsibilities for rulemaking, enforcement and adjudication are combined within a single agency. Our study did reveal, however, that because Congress [in setting up the split-enforcement model], did not specify clearly the . . . responsibilities of [the different agencies involved] in resolving questions of law and policy, unnecessary conflicts have arisen between the agencies and there has been confusion expressed by reviewing courts over which agency's views were entitled to the greater deference.

Id.

¹⁴⁷ Flanagan, *Redefining the Role*, *supra* note 3. Professor Flanagan wrote a second article opposing central panel ALJ final decision authority entitled, *An Update on Developments in Central Panels and ALJ Final Order Authority*. See Flanagan, *An Update*, *supra* note 3 (cited 15 times).

¹⁴⁸ Moliterno, *supra* note 3.

*ALJ Finality*¹⁴⁹ (cited 16 times). I will begin my discussion of these articles with a discussion of Professor Moliterno's article.¹⁵⁰

A. *Moliterno's Article, The Administrative Judiciary's Independence Myth*

For purposes of this paper, I am defining "decisional independence" as, "the ability of an ALJ to reach a final decision in each case based solely on the evidence of record, the matters of which official notice may properly be taken, and the applicable law without undue pressure or interference from the agency or any outside parties." As indicated below, the case law and the academic and professional commentaries support the independence of ALJs using this definition.¹⁵¹ This is not the definition of ALJ independence that Professor Moliterno uses. His definition revolves around final decision authority only. Professor Moliterno asserts that ALJs lack independence because the agency, in most jurisdictions, may overrule the ALJ's recommended decision and reach other conclusions both on factual and legal issues.¹⁵²

The article *ALJ Independence and Final Order Authority*, by David Marcus, contains an excellent response to this assertion.¹⁵³ ALJ Marcus writes, in part:

[T]hese issues are not concerns for ALJ independence; rather, they are concerns about fairness and the appearance of fairness in the agency's final order decision process.

¹⁴⁹ Rossi, *Final, but Often Fallible*, *supra* note 3. Professor Rossi wrote an earlier version of *Final, but Often Fallible*. It is entitled, *ALJ Final Orders On Appeal: Balancing Independence with Accountability*, 19 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (1999) (cited 12 times).

¹⁵⁰ See *infra* Part X.A.

¹⁵¹ See *infra* notes 153–167 and accompanying text.

¹⁵² See Moliterno, *supra* note 3, at 1224–25.

¹⁵³ See David Marcus, *ALJ Independence and the Issue of Final Order Authority*, ADMIN. L. NEWSL. (Or. State Bar, Admin. Law Section, Tigard, Or.), Winter 2009, at 1, 2, available at http://osbadmin.homestead.com/files/newsletters/AdminNL_Winter_09.pdf.

As an ALJ who has conducted contested case hearings involving a variety of agencies, I have held numerous cases in which I was authorized to issue a final order, and numerous other cases in which I was authorized only to issue a proposed order, with the agency involved reserving its authority to issue the final order. In my view, the independence of an ALJ is not affected by the decisional authority delegated to the ALJ in the case.

The “independence” of the ALJ is related to the conduct of the hearing—to develop a full record—and to the preparation of the ALJ’s order based solely on that record.¹⁵⁴

Based on my own twenty years of experience as an ALJ and hearing officer in Texas, I think ALJ David Marcus is absolutely correct. In over twenty years as an ALJ, I had both cases in which I had final decision authority and cases in which I had authority only to make a recommended decision. Whether I had final decision authority or authority only to make a recommended decision made little difference in how I handled the case, except that I probably spent a little less time on a recommended decision than a final one, since the hearing rules under which I practiced required anyone appealing my decision to the agency head to file exceptions with me before the exceptions went to the agency head. This gave me a chance to amend the recommended decision if, on reading the exceptions, I considered some of them to be well taken or to expose ambiguities in my explanation of the decision that needed correction.

Professor Moliterno begins his article by stating that administrative law is not his field, but is a field to which he has only recently been introduced by Professor Charles H. Koch, Jr.¹⁵⁵ Professor Moliterno’s article adopts a position against central panel ALJ final decision authority.¹⁵⁶ His arguments rest primarily on the

¹⁵⁴ *Id.*

¹⁵⁵ See Moliterno, *supra* note 3, at 1191 n.*.

¹⁵⁶ See *id.* at 1230–31.

Flanagan and Rossi law review articles,¹⁵⁷ but Professor Moliterno builds his position through a series of arguments, which are flawed and demonstrably incorrect.

The most critical flaw is the most basic: Professor Moliterno's main thesis as stated in his title is that ALJs lack—and are intended to lack—independence from the agencies they work for.¹⁵⁸ If this were true, the administrative adjudication process would be a sham with pre-ordained results. Fortunately, the weight of authority is overwhelmingly against Professor Moliterno's conclusion that ALJs lack independence.¹⁵⁹

In *Butz v. Economou*,¹⁶⁰ a 5–4 decision of the U.S. Supreme Court, Associate Justice Byron R. White addressed the ALJ independence issue and held that federal ALJs clearly have decisional independence free from improper influence by their host agencies.¹⁶¹ Justice White stated this view, in which he was joined by a majority of the court, as follows:

[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. . . . [T]he Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing under § 5 of the APA, a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a

¹⁵⁷ See *id.* at 1191 n.2, 1225 n.173, 1226 n.179, 1226–27, 1227 n.181, 1227 n.182, 1228 n.189, 1229 n.198, 1229–30, 1230 n.200, 1230 nn.202–03, 1231 n.206, 1233 n.212.

¹⁵⁸ See *id.* at 1191, 1192.

¹⁵⁹ See *infra* notes 160–167 and accompanying text.

¹⁶⁰ 438 U.S. 478 (1978).

¹⁶¹ See *id.* at 513–14.

hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation so far as is practicable. They may be removed only for good cause established and determined by the Civil Service Commission¹⁶²

Also disagreeing with Professor Moliterno, in an exhaustive study of the federal ALJ position for the Administrative Conference of the United States (ACUS), some of our leading administrative law academics, Professors Paul R. Verkuil, Daniel J. Gifford, Richard J. Pierce, Jr., Jeffrey S. Lubbers, and Professor Moliterno's mentor, Charles H. Koch, Jr., wrote: "In short, ALJs are very nearly as independent of federal agencies as federal trial judges are of the executive branch. This high degree of independence of ALJs from agencies is designed to protect the rights of individuals affected by agency adjudicatory decisions from any potential source of bias."¹⁶³

Also at odds with Professor Moliterno's conclusion that ALJs lack independence is the ABA Section of Administrative Law and Regulatory Practice's *A Guide to Federal Agency Adjudication*, which states in part: "Improper interference with ALJ performance includes interference with the writing of opinions or interference with the way in which an ALJ conducts hearings. Courts have held that the decisional independence of the administrative judiciary is constitutionally protected."¹⁶⁴

¹⁶² *Id.* (citations omitted).

¹⁶³ Verkuil, Gifford, Koch, Pierce, & Lubbers, *supra* note 39, at 982; *see also* KOCH, *supra* note 129, at 62 ("Presiding officials who are designated ALJs have a special status established and protection by the APA. Although ALJs do not have the status of Article III judges, their independence is firmly established and accepted.").

¹⁶⁴ AM. BAR ASS'N, SECTION OF ADMIN. LAW AND REGULATORY PRACTICE, *A GUIDE TO FEDERAL AGENCY ADJUDICATION* 176–77 (Michael Asimow ed., 2003) (footnotes omitted) (citing *Perry v. McGinnis*, 209 F.3d 597, 603–08 (6th Cir. 2000); *Harrison v. Coffman*, 35 F. Supp. 2d 722 (E.D. Ark. 1999)); *see also* Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT'L ASS'N ADMIN. L. JUDICIARY 321 (2002). Such well-thought-of administrative adjudicators as Edwin L. Felter, Jr., Senior ALJ of the Colorado

Professor Moliterno has simply redefined the term “independence” to place ALJs outside his definition and has ignored the fact that the term has been used almost universally by the courts, academics, and the organized bar to describe ALJs. His contention that ALJs lack independence made a catchy title for his law review article, but Professor Moliterno’s arguments in support of his thesis clearly will not stand up to analysis.

Professor William S. Jordan, III has also drawn this conclusion.¹⁶⁵ In his article, *Chevron and Hearing Rights: An Unintended Combination*, Professor Jordan writes that,

James Moliterno insists that ALJs are impartial as a result of the APA’s provisions but that they are not independent In administrative law parlance, however, they are generally considered to be independent, particularly because their salaries and positions are protected and because the APA requires separation of the functions of investigation and prosecution from the ALJ’s function of decision. Moliterno is correct that the agency controls policy, but the ALJ is both independent and impartial in factual decisions.¹⁶⁶

Another flaw in Professor Moliterno’s arguments appears where he writes:

Although administrative judges are not required to follow precedent, they are required to

Office of Administrative Courts and Adjunct Professor at the University of Denver Sturm College of Law, and AJ Ann Marshall Young of the Nuclear Regulatory Commission have also written on the decisional independence of ALJs. See Edwin L. Felter, Jr., *Accountability in the Administrative Law Judiciary: The Right and Wrong Kind*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 19, 26 (2010); Ann Marshall Young, *Judicial Independence in Administrative Adjudication: Past, Present, and Future*, 19 J. NAT’L ASS’N ADMIN. L. JUDICIARY 101, 117 (1999). The Felter and Marshall Young articles cannot be reconciled with Professor Moliterno’s view that administrative law judges lack independence.

¹⁶⁵ See William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 251 n.7 (2009).

¹⁶⁶ *Id.* (citation omitted).

make their decisions impartially based on factors outside of their own senses of proper agency policy. Clearly, administrative judges must follow the agency's legislative rules, but, perhaps more controversially with some administrative judges, they must also follow other statements or indicators of agency policy.¹⁶⁷

Professor Moliterno's statement above about ALJs not following precedent and not being required to follow statements or indicators of agency policy other than properly promulgated rules is incorrect.

1. Moliterno's statement that ALJs do not follow precedent

The treatise by Frank E. Cooper, *State Administrative Law*, correctly summarizes the common practice of state and federal agencies with regard to following their own precedents.¹⁶⁸ Cooper writes:

[I]t can fairly be said that administrative agencies act very much the same as do the courts, so far as concerns their respect for precedents. An agency may consider as settled a question recently decided by it, for the very reason that a precedent exists. At the same time, as do the courts, agencies distinguish and in appropriate instances overrule their own precedents. The colorful phrase of Judge Wyzanski, who remarked "The administrator is expected to treat experience not as a jailer but as a teacher," can be applied equally to the courts and to the state agencies. This approach to precedent has evolved with the increasing maturity of the agencies. It was long assumed that there was but little room to apply the

¹⁶⁷ Moliterno, *supra* note 3, at 1199 (footnote omitted) (citing Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 695–96 (2005)).

¹⁶⁸ See FRANK E. COOPER, 2 STATE ADMINISTRATIVE LAW 530–31 (1965).

doctrine of stare decisis to determinations of administrative agencies; they were not expected to apply fixed or unvarying rules or policies; but to exercise discretion and ingenuity in working out a satisfactory solution for each new case. Further, it was generally conceived that since the announcement of a decision by an agency did not establish a rule of law but represented rather an *ad hoc* determination, the foundations of the doctrine of stare decisis (which were deeply rooted in the notion that the law was unchanging) did not square with the theory of administrative adjudication.

....

However, many agencies, motivated in part no doubt by practical considerations and arguments of convenience, have adopted the practice of relying heavily on their decisions in former cases. As long ago as 1941, the Attorney General's Committee on Administrative Procedure found that "in almost every instance the agencies' officers who were interviewed expressed the belief that they accorded to the precedents of their respective agencies as much weight as is thought to be given by the highest court of a state to its own prior decisions."¹⁶⁹

2. Moliterno's assertion that ALJs are required to follow statements or indicators of agency policy other than properly promulgated rules

In his classic work, *Manual For Administrative Law Judges*, retired ALJ Merritt Ruhlen has summarized the law on the requirement that AJs follow an agency's legislative rules and other statements or indicators of agency policy, as follows:

¹⁶⁹ *Id.* (footnotes omitted) (quoting *Shawmut Ass'n v. SEC*, 146 F.2d 791, 796 (1st Cir. 1945); OFFICE OF THE ATTORNEY GEN., FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 466 (Gov't Printing Office 1941), available at <http://www.law.fsu.edu/library/admin/pdfdownload/1941appendixM.pdf> (last visited July 22, 2013)).

The cornerstone of the formal administrative process is the principle that the decision of the Administrative Law Judge is an independent intellectual judgment, based solely upon the applicable laws (including agency regulations and precedent) and the facts contained in the record. This has several consequences.

The Judge should not consider public or private statements of agency members or heads, Congressmen, or congressional committees. The only non-record pronouncements of government officials relevant to his decision are *official* and *operative* pronouncements: not policy statements by the agency members but agency rules and decisions; not speeches by administration officials but current Executive Orders; not comments by Congressmen or congressional committees but statutes of present effect. It is not fair to expect the parties to answer contentions not of record. Moreover, most such contentions, however high the source, are made without benefit of the factual information developed at the hearing.

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. It is the Judge's duty to decide all cases in accordance with agency policy. Even when court decisions (other than those of the Supreme Court) have found the agency's position to be erroneous, he is bound to apply the agency view if the agency has authoritatively declared its nonacquiescence in the decisions. However, if the parties have introduced evidence or arguments, not previously considered by the agency which tend to show that established policy should be changed, the Judge should consider such contentions and if he is convinced he should so find.

This is not to suggest that the Judge should seek to divine that result which the current membership of the agency will approve. His

responsibility is to follow established agency policy. To attempt to predict future votes would be an abdication of his proper role. The whole purpose of the Judge's decision is to give the agency the benefit of his judgment after a proceeding specifically designed to elicit the truth of the matter; nothing whatever is gained if he seeks to set before the agency members instead only a mirror of their own thoughts, no matter how obtained. For this reason the Judge's decision should not be swayed by any tentative finding of fact or conclusion of law or policy contained in an order of investigation, an order to show cause, or any other action by which the agency has indicated how it is thinking.

Agency staff's view should be subjected to the same impartial scrutiny as the views of any other interested person. There is no room for a presumption that the staff position is superior because it is put forward as an objective, untainted furthering of the "public interest". It is the Judge's job to decide where the public interest lies, and the theory of the system presumes that this is best achieved by impartial evaluation of all facts and arguments on their merits.¹⁷⁰

When he directly addresses the subject of the finality of an ALJ decision, Professor Moliterno first cites the applicable section of the federal APA for the proposition that the agency, not the ALJ, has final decision authority.¹⁷¹ Of course, the federal APA has no direct bearing on whether a particular state central panel ALJ has final decision authority.¹⁷² A person must look instead to the state APA or sometimes to the organic state statute governing the particular agency

¹⁷⁰ MERRITT RUHLEN, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MANUAL FOR ADMINISTRATIVE LAW JUDGES 66–68 (1st ed. 1974).

¹⁷¹ Moliterno, *supra* note 3, at 1224 (citing federal Administrative Procedure Act, 5 U.S.C. § 557 (2000)).

¹⁷² See *supra* Part VIII (discussing the fact that individual state APAs and enabling acts (rather than the federal APA) govern state administrative adjudication).

to determine whether a central panel ALJ does or does not have final decision authority in a particular case.¹⁷³ The federal APA applies only to federal agencies. State agencies are subject to state APAs and enabling acts for each agency—not to the federal APA.¹⁷⁴

Professor Moliterno next argues that, “Administrative judges . . . exist in order to further the policies of the executive branch, specifically the agency for which they judge, through the impartial adjudication of disputes. Allowing administrative judges final authority over policy and perhaps even over fact findings, however, would thwart that end.”¹⁷⁵

Professor Moliterno’s statement that ALJs exist to further the policies of the executive branch is a misstatement. The ALJ’s proper role is as a neutral. It is to make certain both sides to the case receive a fair hearing, not to further the mission or policies of an administrative agency—except insofar as the agency proves those policies have been properly promulgated—and to apply the properly promulgated agency policies and the law to the facts in the case before the ALJ. Stated another way, the ALJ’s intended role is not to have either a pro or anti-agency bias, but to confront every case with an open mind. The ALJ’s role is to fully and fairly analyze the facts and legal arguments presented and to decide each case based on the record, according to the rule of law, to the best of the ALJ’s ability. The ALJ’s job, like the job of any other judge, is to “call balls and strikes and not to pitch or to bat.”¹⁷⁶ Indeed, under the U.S. Supreme Court’s decision in *Goldberg v. Kelly*, this neutral role of the ALJ is constitutionally required.¹⁷⁷

On the issue of ALJ finality, Professor Moliterno primarily adopts the arguments of Professors Flanagan and Rossi. He writes:

¹⁷³ See *supra* Part VIII.

¹⁷⁴ *Id.*

¹⁷⁵ Moliterno, *supra* note 3, at 1226.

¹⁷⁶ John Roberts, Chief Justice, U.S. Supreme Court, Opening Statement to the Senate Judiciary Committee During Nomination Hearings (Sept. 12, 2005) (stating the proper role of a judge), available at <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

¹⁷⁷ 397 U.S. 254, 271 (1970) (finding that “an impartial decision maker is essential.”).

Flanagan argues that granting final authority [to ALJs] “will significantly alter state contested case adjudication by creating inconsistencies between the agencies’ articulated policies and the results achieved through contested case litigation and will adversely affect the agency’s enforcement of its statutory mandate.”

....

. . . Such authority is irreconcilable with their role as an executive judiciary¹⁷⁸

In a footnote, Professor Moliterno quotes Professor Rossi, writing: “ALJ finality . . . risks undermining core executive branch functions and thwarting accountability norms.’ Indeed, Rossi even questions the constitutionality of the idea. . . . ‘[T]he cases are decidedly unhelpful in addressing whether delegation of final order authority to an ALJ outside of a politically accountable agency is constitutional.’”¹⁷⁹

Switching back to his main text, Professor Moliterno notes that, “furthermore, there is reliable evidence that . . . [ALJ final decision authority] will produce uncertainty in the law and a loss in accountability, and will nullify agency experience in applying the law and agency discretion in applying its own rules.”¹⁸⁰

In another footnote, Professor Moliterno adds:

Flanagan defends these views extensively and ably, and his article has never received an adequate response from anyone of an opposing outlook. His final conclusion—that “the executive department has lost some of its ability to enforce the law,” because of ALJ finality—is another cogent and unanswered

¹⁷⁸ Moliterno, *supra* note 3, at 1226–27 (footnotes omitted) (quoting Flanagan, *Redefining the Role*, *supra* note 3, at 1362).

¹⁷⁹ *Id.* at 1227 n.181 (alteration in original) (citations omitted) (quoting Rossi, *Final Orders on Appeal*, *supra* note 3, at 2, 10 (internal quotation marks omitted)).

¹⁸⁰ *Id.* at 1227.

argument in favor of continuing the present system of agency review.¹⁸¹

Recognizing that “an adequate response” is in the eye of the beholder, as a person of an opposing outlook, I will respond to the arguments of both Professor Flanagan and Professor Rossi in the next two subsections of this paper.¹⁸² However, before I respond, I must take issue with Professor Moliterno’s assertion that their arguments have gone unanswered or have not been adequately responded to previously. John Hardwicke, retired Chief ALJ of the Maryland OAH, debated Professors Flanagan and Rossi on the central panel ALJ final decision issue in 2004.¹⁸³ Many who either heard the debate or read the transcript thought that Judge Hardwicke clearly won the debate. I will discuss some of his key points in more detail below.

Further, there are several articles supporting final decision authority for ALJs that predate the articles of Professors Flanagan and Rossi to which neither have ever responded. These articles include Richard M. Hluchan, *Administrative Adjudication in New Jersey: Why Not Let the ALJ Decide?*¹⁸⁴ Mr. Hluchan argues persuasively that allowing the agency to change the outcome of a recommended neutral central panel ALJ decision is unfair to the private litigant and unnecessarily runs up costs for both the state and the private litigant.¹⁸⁵ He also argues that it unnecessarily delays the

¹⁸¹ *Id.* at 1227 n.182 (citation omitted) (quoting Flanagan, *Redefining the Role*, *supra* note 3 at 1410).

¹⁸² *See infra* Part X.B–C.

¹⁸³ *See* Flanagan, Rossi, Hardwicke & Butler, *supra* note 120.

¹⁸⁴ Richard M. Hluchan, *Administrative Adjudications in New Jersey: Why Not Let the ALJ Decide?*, N.J. LAW, Oct./Nov. 1996, at 28, *reprinted in* 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 560 (2013). This article is being reprinted at my request as an example of law review articles supporting final decision authority for central panel ALJs. Although these articles exist, they have appeared primarily in journals of limited circulation and have been written as advocacy pieces in an attempt to influence lawmakers in the jurisdictions in which the articles appear. To my knowledge, none of them have previously been run in law journals with a national circulation.

¹⁸⁵ *Id.*; *see also* Testimony of Red Tape Review Group Hearing, Richard M. Hluchan *et al.* (Mar. 2, 2010) [hereinafter Testimony to Red Tape Review Group], *available at*

time it would otherwise take to get to an appellate court for review.¹⁸⁶ Professor Flanagan cites the Hluchan article but does not discuss it in

http://www.nj.gov/governor/news/reports/pdf/20100302_rtg.pdf (last visited Nov. 22, 2013) (supporting ALJ final decision authority for the New Jersey Central Panel before the New Jersey Governor's Red Tape Review Group). Mr. Hluchan testified, in part:

In addition to being a matter of fundamental fairness and due process, the current system is really inefficient. It costs more money than is necessary, it consumes more staff time than is necessary, and it adds additional time, all of which is unnecessary.

We have the commissioner essentially doing a redundant review of the ALG's [sic] decision. And, of course, when we say the Commissioner, we know the commissioner does not personally review every one of these and write a decision and review the transcript, and so forth. It's the staff that we're talking about that do that.

So if we eliminate this redundant review you free up staff to do more important things. You don't have the cost of the redundant review and you don't have, from the point of view of both sides, the additional time that's consumed.

Id. at 39–40.

¹⁸⁶ *Id.*; see also Testimony to Red Tape Review Group, *supra* note 185, at 91–92. Mr. Joseph Morano, former chair of the Administrative Law Section of the State Bar of New Jersey, testified in favor of central panel ALJ final decision authority. His hearing testimony transcript is as follows:

One of the things you also need to look at . . . [when] the administrative law judge . . . issues an initial decision [and] the agency reviews, there's the period of exceptions where one party may say I disagree with the ALJ's decision for the following reason

. . . .

. . . [In many] of these cases we have [attorneys from] large firms representing towns, school districts, counties, also private entities Attorneys don't do this for free. . . . [This cost is in addition to the cost for whoever] at the agency . . . is reviewing it. [T]hat's a whole other level of cost

. . . .

It's more expensive, it's time-intensive, and it takes a long time. So that maybe makes parties on both sides think a little bit about what they are going to do [before just automatically appealing a decision they disagree with to the New Jersey

any depth.¹⁸⁷ Instead, his only comment on the Hluchan article is that, “Citizen frustration at the power of agencies to overturn the ALJ’s decision after the ALJ and the parties have invested substantial time and effort in presenting the case and obtained a favorable result is understandable and extensive.”¹⁸⁸

Professors Flanagan and Rossi have also failed to respond to Robert S. Lorch’s *Administrative Court via the Independent Hearing Officer*, where Professor Lorch argues that state agency heads, many of whom are without legal training, lack the legal expertise to overrule central panel ALJ adjudicatory decisions; therefore, they should not have final decision authority.¹⁸⁹ Professor Lorch also wrote a book, *Democratic Process and Administrative Law*, in which he makes essentially the same argument as he did in the previously-mentioned article:

So long as hearing-officer decisions are only recommendations, administrative adjudication will continue to display some terribly questionable practices as a consequence. Many agency heads who now have adjudicatory power are not lawyers: the members of a state board of barber examiners, for example. . . . The question whether an agency head is or is not a lawyer is significant partly because in administrative adjudication the rules of evidence are relaxed and legal training is useful to handle and assess the great junk yard of evidence that sometimes piles up in an administrative hearing.¹⁹⁰

courts].

Id.

¹⁸⁷ See Flanagan, *Redefining the Role*, *supra* note 3, at 1386 n.136.

¹⁸⁸ *Id.* at 1386 (citing Hluchan, *supra* note 185, at 28).

¹⁸⁹ See Robert S. Lorch, *Administrative Court via the Independent Hearing Officer*, 51 JUDICATURE 114, 118 (1967).

¹⁹⁰ See ROBERT S. LORCH, *DEMOCRATIC PROCESS & ADMINISTRATIVE LAW* 211 (1969); see also John W. Hardwicke, *The Central Panel Movement: Problems, Solution, and Ethical Considerations*, 2 GOV’T L. & POL’Y J. 17 (2000) (taking an opposite position to Professor Flanagan’s position on almost every issue that Professor Flanagan discusses).

B. *The Flanagan Articles*

In his original article on Central Panel ALJ Final Decision Authority, Professor Flanagan states the following:

The core argument for agency review is that the legislature delegated to the agency the responsibility for enforcing a particular comprehensive statutory scheme, including the development and application of legislative policy through regulations. Contested cases often raise important policy questions that could not have been anticipated, are not covered by the regulations, or are created by the complexity of the case. Moreover, the agency has institutional experience and expertise in the application of the statute that makes it the appropriate final decisionmaker. Agency review of contested cases also provides greater consistency in decisionmaking so that factually similar cases are decided the same way, at least when they are decided at or about the same time. In addition, agencies are politically accountable for the results of their regulation, but ALJs in independent central panels adjudicating individual cases, are accountable only for the decision in each case heard. ALJs are not accountable for insuring that the decision meshes with other decisions or the cumulative impact of the decisions by all ALJs.¹⁹¹

Professor Flanagan returned to these themes and the other themes of his first article in a second article published three years after the first article. In this second article, Professor Flanagan writes:

¹⁹¹ Flanagan, *Redefining the Role*, *supra* note 3, at 1399 (footnotes omitted).

[D]ebate over ALJ finality has moved to a more sophisticated level as experience has been gained with this issue. This Article probes some of the arguments in favor of ALJ finality, including the need for ALJ independence, the claims that agencies misuse their review powers, and the need to address litigant dissatisfaction with administrative adjudication. In my opinion, neither ALJ independence nor the central panel concept requires ALJ finality. Data from an extensive study in North Carolina indicates that agency review is not being abused, nor will ALJ finality cure litigant dissatisfaction.

Finally, proposals have been advanced to address some of the adverse consequences of ALJ finality. Some suggest that the agency should present its policies during the contested case to ensure that ALJs act in conformity with it.¹⁹²

With respect to the suggestion that the agency present its policies to the ALJ during the course of the hearing, Flanagan argues:

The major disadvantage of ALJ finality is the inevitable differences in policy and enforcement that occur when the agency is responsible for enforcement, but the final decision on any action is made by the ALJ. This has occurred in the few federal agencies with split-enforcement models, as well as the more recent experience in Louisiana, where the ALJ makes the final agency decision without any agency review. There are procedures for identifying important policy

¹⁹² Flanagan, *An Update*, supra note 3, at 403 (footnote omitted). Professor Flanagan relies on Professor Daye's study of cases in North Carolina to support his argument that the agencies are not abusing their final decision authority. See *id.* at 403 n.9 (citing Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571 (2001)). But Professor Flanagan's interpretation of Professor Daye's study draws inferences from the data that Professor Daye himself never drew. Flanagan claims the study shows that agencies are not abusing their authority. See *id.* at 403. Professor Daye never claims this.

issues before the hearing. Can the problem of inconsistent decision-making be addressed by having the agency present its policy during the contested case so that the final ALJ decision will incorporate the agency's policy and enforcement view? For several reasons, I do not believe so.¹⁹³

Before continuing with Professor Flanagan's explanation of why he thinks presenting agency policy on the record during the course of the hearing will not work, let us look briefly at what others have said on this subject.

In 2005, the late Professor Charles H. Koch, Jr., author of a five-volume treatise on Administrative Law—now in its third edition and still current through its pocket parts—wrote on making agency policy part of the record as follows:

Policy in adjudication requires that the facts compiled in the hearing-level record adequately support policy determinations and the justification for those decisions. In the end, the administrative judges must be responsible for the adequacy of the record for this purpose. Fortunately, administrative law permits administrative adjudicators to actively participate in the development of the record.

Adjudication decides individual rights or duties, consequently it focuses on facts related to the specific dispute, "adjudicative facts," and its procedures are designed to serve this purpose. Policymaking requires the development of more general or societal facts, called "legislative facts." An agency needs legislative facts to support and justify [sic] its policy conclusions. Obviously, the power to identify and find those facts constitutes a considerable part of the power to make policy. . . .

Flexible application of the traditional evidentiary rules permitted in many administrative

¹⁹³ *Id.* at 426–27 (footnotes omitted) (citing TEX. GOV'T CODE ANN. § 2001.058(c) (West 2001); CAL. GOV'T CODE § 11425.60 (West Supp. 2000)).

adjudicative settings might go some distance to facilitate a policymaking record. . . . Evidence clearly relevant to a policy question, even if tangential to the specific dispute, might then be admitted as relevant to the general resolution of the controversy.¹⁹⁴

Professor Koch suggests that, in addition to freely allowing the parties to present expert testimony to establish agency policy and present necessary evidence on technical issues, the policymaking record may be built through official, administrative, or judicial notice, but that before an ALJ takes official, administrative, or judicial notice of a fact, the ALJ should offer the parties an opportunity for presentation of alternative evidence.¹⁹⁵ In support of his assertion that the ALJ may build the policymaking record without formal presentation of evidence through taking official, administrative, or judicial notice of facts, Professor Koch quotes the following language from the U.S. Supreme Court opinion in the case *City of Erie v. Pap's A.M.*: “[I]t is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such ‘legislative facts’ within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment.”¹⁹⁶

According to Professor Koch, there is no good reason why an agency cannot build a policymaking record by directing an ALJ’s attention to appropriate materials and requesting that the ALJ take official notice of them.¹⁹⁷

In addition, Judge Hardwicke, in his debate with Professors Flanagan and Rossi, spoke in support of agency presentation of its policies during the contested case hearing. Judge Hardwicke’s remarks on making policy part of the record in the hearing, were, in part, as follows:

¹⁹⁴ Koch, *supra* note 167, at 726–27 (footnotes omitted).

¹⁹⁵ See *id.* at 729.

¹⁹⁶ *Id.* (alteration in original) (emphasis omitted) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000)) (internal quotation marks omitted).

¹⁹⁷ See *id.*

Agency expertise in support of agency decisions is placed upon the table at the hearing *qui audit decidet*. He who hears decides, is the key principle of our life and our law. To defer the final decision back to the agency is, in effect, to give the agency a second bite at the apple. In the central panel system and similar systems that we're familiar with, adjudicatorial process is adversarial. . . . Consequently, many states have placed a statutory limitation upon the agency's ability to overrule the judge except for limited specific reasons. . . .

The truth of the matter is that we are trying to prevent the agency head from overturning a decision [every time it is one] with which he or she disagrees. Neither the agency nor the respondent may be agreeable losers; indeed the agency may believe that the action would not have been pursued at all without justification. Consequently, when the agency loses, it may find reasons, or attempt to find reasons, policy reasons or whatever, for reversing.

. . . .

Agency policy, as well as the agency's expertise, is put on the table at the hearing through its staff of experts. Agency policy is part of the law of the case and part of the assignment of the judge to apply in a given case. . . .

. . . .

I think the policy positions of the agencies should be put on the table at the hearing. . . . [I]f you have a polluter, for example, that has been a very bad apple, the local EPA has had trouble with this person for years, and so on the fifth offense, it seeks the maximum penalty, a fine of \$50,000 a day and \$50,000 for each offense. I want the agency to come before the administrative law judge, and detail this record and recommend the fine and penalty. It seems to me that those policy concerns must be put on the table and it is there that they must be dealt with. Give the malfeisor the opportunity to respond and deal with it in that manner. I think that's a far better and proper

way to do it than by the in-house agency commission head.

....

I distrust a situation where the policy problem is not brought up until the hearing and [is then] decided by one of the litigants.¹⁹⁸

To the contrary of Professor Koch and Judge Hardwicke's views that policy should be made part of the record, Flanagan argues that the agency cannot adequately make its policies part of the record of the hearing.¹⁹⁹ He argues that this is true because an agency cannot always anticipate policy issues to be resolved and their proper resolution before trial.²⁰⁰ The agency may be able to anticipate policy issues in repetitive, routine cases but cannot always anticipate them in more significant cases.²⁰¹ Flanagan supports this statement with two arguments.²⁰² First, he argues the policy articulated by lower level or mid-level agency staff in making an initial decision leading to a dispute underlying a contested case may not be "the same as the policy that the [agency] leadership would apply."²⁰³ Second, he argues that "the facts reviewed by the staff in making the [initial] decision" may not be "the same facts that the ALJ will hear and determine in the contested case."²⁰⁴ Flanagan argues the more difficult and important the case, the less likely it is the agency will fully understand the facts and policy issues and their proper resolution.²⁰⁵ He also argues that low and mid-level agency employees make the decisions that eventually lead to contested cases.²⁰⁶ He says they decide whether "to grant or deny a license or a permit, or take other administrative action," based on established

¹⁹⁸ Flanagan, Rossi, Hardwicke, & Butler, *supra* note 120, at 200–01, 210–11.

¹⁹⁹ Flanagan, *An Update*, *supra* note 3, at 426–27.

²⁰⁰ *Id.* at 427.

²⁰¹ *Id.*

²⁰² *See id.* at 427–28.

²⁰³ *Id.* at 427.

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *Id.*

agency policies and precedent.²⁰⁷ These policies and precedents do not necessarily reflect what the leadership would do if the matter were to come before them again for reconsideration.²⁰⁸

Stated another way, Flanagan claims that information in administrative adjudication increases over time, and agency staff may not know all the relevant facts at the time it makes an initial decision to grant or deny a license or permit or take other action.²⁰⁹ Flanagan notes that, “Obviously, the agency staff receive[s] some information from [the opposing party]” before it makes its initial decision.²¹⁰ But, “this information is [often] indefinite and incomplete. . . . [T]he facts have not been probed and proved in a trial-type proceeding”²¹¹ He states that, often, the evidence presented in the trial of the case will be “substantially more detailed” than the agency staff initially anticipated.²¹² As long as there is any difference between the facts initially presented to the agency and the facts ultimately proved to the ALJ during the hearing, there may be uncertainty in what applicable agency policies are.²¹³

Flanagan says agency staff may not always know agency leadership’s preference on policies applicable to contested case adjudication.²¹⁴ He argues that, “policy is the province of the agency leadership.”²¹⁵ Because of time constraints, agency leadership often do not involve themselves in the early stages of litigation.²¹⁶ Agency leadership often do not take an active role in litigation until after the litigation has ended because their heavy workload often prevents their active involvement in a case until then.²¹⁷ For these reasons, Flanagan argues that the agency needs an opportunity to review ALJ

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 427–28.

²¹⁴ *See id.* at 427.

²¹⁵ *Id.* at 428.

²¹⁶ *Id.*

²¹⁷ *See id.*

decisions before they become final.²¹⁸ These arguments do not ring true to me. I presided as an ALJ in complex cases (and sometimes not-so-complex cases) for several agencies for over twenty years. The agencies for which I heard cases routinely assigned their most difficult and important cases to their best attorneys. These attorneys, with whatever formal or informal discovery was needed, made certain they understood the facts of the case and the policy issues to be resolved before proceeding to trial.

Further, in all cases I heard, the agency attorneys had obviously discussed any unique or unusual issues with agency top-management. I always found that agency attorneys knew the policies that agency leadership wanted to follow at all stages of every hearing. Further, in the more important cases, a high-level institutional agency representative was present in the hearing room, sitting at counsel table to confer with the agency attorney. Occasionally, an agency attorney might seek a break or continuance to check applicable policy with higher-level agency management after some unanticipated evidence or arguments. I freely granted these postponements, and we were always able to move forward (usually later the same day). If necessary, I would entertain a motion to reopen the evidence at the end of a hearing for the agency attorney or opposing counsel to put on additional evidence of agency policy or other relevant matters. I even did this once or twice on my own motion. Thus, if the agency, its adversary, or I realized after the evidence closed that there was a gaping hole in the record, we were able to deal with it by reopening on a case-by-case basis as justice and sound case management required. Although my experience in hearing complex agency cases was mine alone, it was far from unique. The way I handled these cases was largely based on the training I received at the National Judicial College, which has trained many thousands of state and federal ALJs in the techniques of conducting complex agency adjudications. When I ran an early draft of this paper past the CPDC, several of the directors and chief ALJs confirmed that this is the same manner in which their ALJs conduct hearings of complex cases and issues.

²¹⁸ See *id.* at 428–29.

Flanagan argues, “The fundamental problem with presenting policy at the contested case is that it puts the proverbial policy cart before the factual horse.”²¹⁹ He argues:

In the middle of the trial, not only are the facts unclear, but also the ALJ, as finder of fact, may not accept the testimony of the agency’s experts, or may find that the [opposing party’s] views are better presented or more persuasive. An ALJ with final authority may adopt his own view of the . . . evidence, subject only to limited judicial review.²²⁰

The agency does not know whether agency policy will be accepted.²²¹ Flanagan states that, “Requiring [agency] policy to be fully developed and articulated [in the middle of a hearing] in the absence of a fixed set of facts is inconsistent with the general jurisprudential approach in our system that rejects the use of advisory opinions.”²²²

Flanagan’s argument concerning advisory opinions takes the law out of context. The law concerning advisory opinions has to do with court decisions based on an uncertain or hypothetical set of facts. It has no application to the presentation of evidence by litigants in a contested case. Further, responsible treatment of the private litigant demands that the agency not bring or defend actions against a private litigant when the agency’s position in the case does not correspond to agency policy. As a matter of sound management and to conserve resources, a responsible administrative agency will take such steps as are needed to assure there is no breakdown in internal communication between policymakers and staff. It is the responsibility of the agency’s chief legal advisor to assure that the agency understands what issues it is litigating and why before putting the citizen to the expense of an unnecessary hearing. If the agency’s discovery or other investigation of the facts shows that agency staff denied a license or filed an enforcement action in conflict with

²¹⁹ *Id.* at 428.

²²⁰ *Id.* (footnote omitted).

²²¹ *See id.*

²²² *Id.*

policies of agency top management, the case should be immediately dismissed without expending the resources necessary to bring it to trial.

What Flanagan really seems to be objecting to is putting the agency through the uncertainties of litigation. But these uncertainties are in the nature of contested adjudications and it would be inappropriate to eliminate them if, in fact, we are to continue to resolve disputes between an agency and private litigants through adjudication. To the best of my knowledge, no one has contended that we should abandon that system.

At least in some central panel states, agency heads have used their final decision authority not to correct occasional error but to overturn virtually every central panel ALJ decision adverse to the agency. For example, a North Carolina study documented the following pattern of decisions by agency heads:²²³

Calendar year	'89	'90	'91	'92	'93	'94	'95	'96	'98
Number of cases in which ALJ ruled against agency	52	30	23	38	35	27	53	34	37
Number of cases in which agency head upheld the ALJ ruling against agency	4	4	3	2	7	5	1	5	6
Percentage of cases in which agency head upheld the ALJ ruling against agency (%)	8	13	13	5	20	18	2	15	16

The data in this chart was contained in a study by the North Carolina General Assembly, Legislative Services Office, Research Division, which was presented to the North Carolina Joint Legislative

²²³ SHUPING, N.C. GEN. ASSEM. RESEARCH DIV., *supra* note 114, at 11–50.

Administrative Procedure Oversight Committee.²²⁴ The data strongly indicates that most of the agencies were using their review authority to change central panel ALJ findings and conclusions in virtually every case that they did not win before the ALJ instead of only occasionally overruling ALJ decisions to correct clear error.²²⁵ One of the questions I will ask in the survey for Part II of this Article is whether other central panels have kept records on the number of times the agencies have turned around the central panel ALJ rulings against the agencies in comparison to the total number of times the central panel ALJs have ruled against the agencies. I will report this information for every jurisdiction for which statistics are available to find out whether the North Carolina statistics are typical. I am also hopeful that a data collection system can be established to collect this information regularly in the future, in as many central panel jurisdictions as possible, for use in the event it is needed for future analysis. This issue is critical and demands further study if the administrative adjudication system is to maintain its legitimacy in the eyes of the public.

In his unpublished essay, Allen C. Hoberg, Director of the North Dakota OAH, states that North Dakota agencies have sometimes abused their authority to change the hearing officer's fact-findings and conclusions.²²⁶ He says that this has occurred most often in cases involving pro se litigants, since the agencies know from experience that pro se litigants generally lack the resources and understanding of the court review process to appeal their cases to the courts when the agencies overturn the hearing officer's fact-findings.²²⁷

John DiLorenzo (a private attorney who practices before the Oregon Central Panel) and former Oregon Central Panel Chief ALJ Thomas E. Ewing, collected data from the Oregon Central Panel which showed an unusually high incidence of agencies overruling ALJ decisions that held against the agency.²²⁸ Reviewing the data

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ Hoberg, *supra* note 86.

²²⁷ *Id.*

²²⁸ *See* John DiLorenzo, *More Independence Needed for ALJs*, ADMIN. L. NEWSL. (Or. State Bar, Admin. Law Section, Tigard, Or.), Fall 2008, at 4, 5.

collected by Mr. DiLorenzo and Chief ALJ Ewing, Oregon Central Panel ALJ David Marcus wrote,

Based on the data he was provided by the OAH, Mr. DiLorenzo raises legitimate concerns about the final decisions rendered by agencies. In that sample of 452 cases, ALJ's [sic] issued only 42 proposed orders contrary to the agency's original notice of proposed action, and of that number more than half were overturned by the agency in its final order. Those numbers clearly raise concerns about fairness in the final order process. As was noted at the most recent meeting of the OAH Oversight Committee, however, better and broader statistics are needed to form a clearer picture of what is actually happening in all agencies for which the OAH conducts hearings but issues only a proposed order.²²⁹

I will similarly be looking for a clearer picture of what is going on in the agency review process through better and broader statistics of central panel final decisions in the survey information to be reported in the second and final part of this paper.

Ignoring the North Carolina General Assembly, Legislative Services Office, Research Division statistics and the other materials cited above, Professor Flanagan argues that only anecdotal evidence supports the claim that agencies sometimes misuse their review authority.²³⁰ He argues there is also anecdotal evidence that some ALJs misuse their authority.²³¹ While I would not be surprised to learn that this might be true in some instances, Flanagan bases his claim that some ALJs abuse their authority on survey information collected by unspecified central panels showing that attorneys and other participants in the central panel hearing process rated the majority of assigned ALJs as "excellent or good," but rated other ALJs as only "fair, poor, or very poor."²³² It seems a stretch to

²²⁹ Marcus, *supra* note 153, at 2.

²³⁰ Flanagan, *An Update*, *supra* note 3, at 421.

²³¹ *Id.*

²³² *Id.* at 421–22 n.108.

assume that these rankings imply misuses of authority. In any system, some judges will be more competent than others. Without additional data, I would interpret this survey information as reflecting more on the competence of individual ALJs than as documentation that they have committed abuses of their authority.

The central panel ALJs lack the built-in conflict of interest that the agency heads have, and this makes central panel judges—at least theoretically—fairer and more reliable final decision makers than the agency heads. The agency head conflict arises through the agency head's dual role as both head of the litigating agency and final decision maker in the adjudications that come before him or her.

Philip Elman, a former member of the Federal Trade Commission, wrote persuasively about the need to eliminate this dual role.²³³ He stated, based on his own experience, that this conflict of interest exerts a strong influence on agency head decisions and argued that this influence often threatens to interfere with a fair hearing for the citizen.²³⁴ Commissioner Elman stated:

On the basis of my own experience and observations, the strongest argument I would make against agency [head] adjudication of alleged violations of law is that the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness. The problem of avoiding prejudgment, in appearance or in fact, constantly hovers over all agency activity and is troublesome to agency members in almost every kind of action it takes. It can arise in the most subtle as well as obvious forms.

Consider, for example, the so-called test case in which the agency issues a complaint in order to establish a new legal principle or remedy Agency members frequently take an active part in the pre-complaint investigative and prosecutorial phases of these cases, and the complaint is usually issued

²³³ See Philip Elman, *A Modest Proposal for Radical Reform*, 56 A.B.A. J. 1045 (1970).

²³⁴ See *id.* at 1048.

with the knowledge that, because of the novelty and importance of the issues, it will be fully litigated and be back for adjudication on the record.

When the test case does come up on appeal to the agency members, while there is no bias or prejudgment of guilt in the classic sense, there is an inescapable predisposition in favor of the agency position as set forth in the complaint. After all, the whole point of starting a test case is to let it go forward into the reviewing courts where the issues may be finally settled. To put it bluntly . . . one should ask for long odds before betting against issuance of a final order. While a test case may be and usually is vigorously contested, the result—at least in the agency phase—is likely to be a foregone conclusion.

Indeed, in such a case an agency member may vote for an order not so much because he is personally convinced that there is a violation of law but because he feels . . . that since it is a test case involving a doubtful or unsettled question of law, his duty is to find against the respondent so that the case may go on to the courts for a definitive resolution. This Catch-22 process may reach full fruition when conscientious judges on the reviewing court affirm the agency ruling, whatever their own doubts about its merits, because they feel obliged to defer to the agency's expert judgment and discretion.

There are other institutional factors that intrude upon fair and impartial agency adjudication. Theoretically, when an agency member sits as a judge, his freedom to decide is the same as if he were on a court. But the judicial process is designed to insure that the judge is both neutral and disinterested and that he has no interest other than that of applying the law fairly and evenhandedly. An agency member, on the other hand, cannot be unconcerned with whether the outcome of the case is to advance or to retard an important agency program to which substantial resources have been committed. Even the most

conscientious regulator cannot, when he acts as judge, ignore the effect which the decision will have on the agency's regulatory policies and goals.

Moreover, an agency member cannot escape the implications of his leadership role in the agency. He may fear the effect on staff morale if he votes to dismiss the complaint or reject the agency position in an important case.²³⁵

Professor Flanagan says three significant questions should be asked before deciding whether to place final decision authority with the central panel ALJ or leave it with the agency.²³⁶ These questions are:

What are the relative qualifications of the agency and ALJ to interpret and apply the law in administrative adjudication? What consequences flow from selecting either the agency or the ALJ [as the final decision authority]? Should the final decisionmaker be one entity, the agency, or be one or more ALJs in a central panel who may have differing perspectives on the law and regulations [governing the agency]?²³⁷

I submit that there is an additional and much more important question, which Professor Flanagan overlooks: Is the ALJ or the agency head most likely to provide both the citizen and the agency with a fair hearing, both in appearance and in fact? This question should be the primary consideration in allocating final decision authority.

²³⁵ *Id.* Similarly Newton Minow, Chair of the Federal Communications Commission (FCC) under President Kennedy, wrote a letter upon his resignation recommending that the FCC be stripped of its adjudicative authority. See Newton N. Minow, *Suggestions for Improvement of the Administrative Process*, 15 ADMIN. L. REV. 146 (1963). In addition, at his resignation, Louis J. Hector, Chair of the Civil Aeronautics Board (CAB) under President Eisenhower, recommended that the CAB be stripped of its adjudicative authority. See Louis J. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960).

²³⁶ Flanagan, *An Update*, *supra* note 3, at 423.

²³⁷ *Id.*

In addition, the added expense of a redundant agency review of all the evidence supporting a neutral panel ALJ's recommended decision—and the extra time this review consumes—should also weigh heavily in deciding whether to allow the ALJ decision to become final, subject to court review, or to require a final agency review in which the agency may change the outcome of the adjudication.

Written with respect to a very specialized form of administrative adjudication in the field of immigration law, Stephen H. Legomsky's article, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*,²³⁸ makes arguments worthy of consideration in the wider context of administrative adjudication. In the article, Professor Legomsky addresses the argument that there is a need for final agency head review of ALJ decisions to assure consistency of decisions as follows:

These arguments are not . . . compelling [C]onsistency, while important . . . does not require the agency head's intrusion into the adjudicative process. When there is a designated [agency in-house review mechanism], an en banc decision . . . can yield the same consistency as agency head review. Congress could even authorize the agency head to require the appellate tribunal to go en banc in a particular case if there is a concern that an overworked adjudicative tribunal would not do so on its own.

The need for agency primacy over policy matters can be conceded, but again, agency head review is not essential to agency policy primacy. Rulemaking and other policy mechanisms are also available. The multiple experts from whom the agency head can distill advice and perspectives will be just as available in a rulemaking proceeding as they are in agency head review of adjudication. The agency head will be just as capable of asserting agency policy primacy via rulemaking as he or she would be via review of adjudication. And rulemaking

²³⁸ 60 STAN. L. REV. 413 (2007).

will be just as effective in promoting agency policy coherence as review of an adjudicative decision would have been—more so, if anything, since the facts of a particular case will not constrain the reach of the rule.

...

While I acknowledge that even adjudicative decisions will often require policy judgments . . . the basic functions of the adjudicators are, after all, to find facts, interpret law, and exercise specific statutory discretionary authority. Even when a case presents an important policy question, the agency head can supersede the decision by issuing a generally applicable regulation if he or she wishes—provided, of course, that Congress has delegated the relevant rulemaking authority to the agency head. If Congress has not done so, then Congress's inaction is itself a policy decision that requires respect.

....

Moreover, the central rationale [usually given] for agency head review—the agency's political accountability—is also precisely what makes agency head review affirmatively troublesome. The agency head and any subordinates to whom he or she delegates the review function are subject to popular and political pressures. On matters of policy that reality is not problematic; consideration of the public's preferences is at home in democratic theory. But the essence of the adjudicative function . . . generally requires independence, not political accountability

....

To sum up: There is little need for agency head review. Decisional consistency can be achieved through a combination of the administrative appellate process, legislative rules (including interim rules when necessary), and interpretative rules. Rulemaking and other powers can also preserve agency policy primacy and agency policy coherence. Moreover, agency head review poses inherent dangers to the dispensation of justice, including especially the substitution of a

political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law.²³⁹

My experience in Texas confirms that the approach of insuring consistency through en banc ALJ decisions works in practice. At the mid-point in my career, I was general counsel to the Texas Comptroller, the late Bob Bullock. We had from five to seven or eight ALJs on our staff who adjudicated all state tax cases—the number of ALJs appointed at any given time varied according to agency caseload, backlog requirements, and available appropriations. When the ALJs came up with conflicting decisions as to when or if a tax was due on a particular type of transaction and under particular facts and circumstances, we would have them sit en banc to arrive at a single decision, which would be the way the issue would be handled in all future cases. The process worked well, was perceived as fair by the attorneys practicing before the Comptroller and the ALJs themselves, and led to consistency in decisions. It also kept Comptroller Bullock from personally intervening in the adjudicative decision-making process. There is no reason that central panels cannot also achieve consistency through en banc decisions by representative panels of judges—if desired by less than all judges in the larger central panels to avoid the unnecessary delay and expense associated with an unwieldy number of judges working on the same problem. It would solve the inconsistency problem that Flanagan is concerned about and would be fairer to the citizen than it would be for the head of the agency litigating against the citizen to make the final decision. It would also be consistent with maintaining good staff morale among the ALJs.

Flanagan states that he has had conversations in which ALJs “suggest[ed] that some [state] agencies are . . . resisting legitimate direction by the executive or legislative branches” of state government and have become “independent power centers.”²⁴⁰ This phenomenon, known in the literature as “regulatory capture,” describes a situation in which the agency begins to represent the

²³⁹ *Id.* at 458–59, 461, 462.

²⁴⁰ Flanagan, *An Update*, *supra* note 3, at 425.

industry it is supposed to regulate rather than the public.²⁴¹ Flanagan makes a tie-in with an article by Professor Jim Rossi:

Professor Jim Rossi . . . noted that state governments have special characteristics that influence the development of state administrative law and central panels. As compared to the federal system, state legislative sessions are shorter, staff resources are fewer and special interests more prominent. The state executive branch is weaker and has less power to develop [agency] policy than the President. In a jurisdiction with a weak governor [in terms of his or her ability to monitor and exercise control over agency activities] and a short legislative session, an agency with broad jurisdiction or important subject matter authority may be insulated from legitimate executive or legislative oversight by an independent political base. In this context, a central panel with ALJ finality may become a legislative tool to counterbalance agency independence by transferring final adjudicative authority from the agency to the central panel ALJ.²⁴²

In the opinion of this paper's author, transfer of final adjudicative authority from the agency to the central panel ALJ may serve to restore the balance in favor of the public interest.²⁴³

In addition to the reasons for the unique problems leading to regulatory capture by industry at the state level noted by Professor Rossi, the late Professor Arthur Earl Bonfield attributed these problems, in part, to the tendency of state legislatures to place

²⁴¹ See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342–44 (2013).

²⁴² Flanagan, *An Update*, *supra* note 3, at 425 (footnote omitted) (citing Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN L. REV. 551, 557–59, 568–72 (2001)).

²⁴³ See *id.*

members of regulated industries on the boards of the agencies that regulate them.²⁴⁴ He writes:

[Conflict of interest problems in state regulatory agencies] are significantly more severe than those created on the federal level [M]any state boards are formally structured to represent particular interests [dentists serving on dental boards, realtors on real estate boards, morticians on funeral regulatory agencies, etc.], a situation that is more unusual in the federal administrative process.²⁴⁵

Flanagan does not view ALJ finality as a good way to control and restrict regulatory capture.²⁴⁶ He says if other state legislatures were to adopt ALJ finality in all agency adjudication, it would be the wrong thing to do.²⁴⁷ It would adversely affect all agencies without regard to the degree to which individual agencies have or have not been properly responsive to executive and legislative leadership.²⁴⁸ Flanagan argues any benefit from weakening the agency by creating an alternate power center in the central panel would be counterproductive.²⁴⁹ Flanagan does not satisfactorily explain why he believes this.²⁵⁰

²⁴⁴ See Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 128 (1982).

²⁴⁵ *Id.*

²⁴⁶ See Flanagan, *An Update*, *supra* note 3, at 425.

²⁴⁷ *Id.* at 425–26.

²⁴⁸ *Id.* at 426.

²⁴⁹ See *id.*

²⁵⁰ One of the early reviewers of this paper has suggested that if final decision authority were to be transferred from agencies to central panel judges, private industry could then simply capture the central panel judges and achieve regulatory capture in that way. While, in theory, this might be true, it would be more difficult for an industry to capture generalist central panel ALJs than it would be for industry to capture an agency charged with regulation of only particular subject matters of interest to a particular industry. Chad M. Oldfather explains in *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 861 (2012), that regulatory capture of specialized agencies and adjudicators is easier than regulatory capture of those with a broader jurisdiction. This is because people outside the industry are likely to pay little attention to selection and appointment of

Flanagan says, in some jurisdictions, ALJ finality has been “proposed as an expedient remedy for litigant frustration with agency adjudication.”²⁵¹ He argues that it would not help much.²⁵² He argues that litigant frustration is mainly “based on the high agency success rate in contested cases.”²⁵³ He states that ALJ finality “will not significantly affect this rate.”²⁵⁴ In support of this argument, he cites Professor Daye’s North Carolina study.²⁵⁵ The study found that ALJs “decided in favor of the agency three quarters of the time.”²⁵⁶ Therefore, Flanagan concludes, few cases would have different outcomes using ALJ finality.²⁵⁷ Flanagan argues that, “The real reason for litigant frustration is that agencies generally bring actions in which they are most likely to prevail.”²⁵⁸ Only by changing the substantive law would litigants prevail more often in administrative adjudication.”²⁵⁹ Flanagan argues that if the law were changed, the agencies would know not to bring actions that did not have a chance under the new law, so even that would not help.²⁶⁰

To the contrary of Professor Flanagan’s hypothesis that litigant dissatisfaction with the administrative hearing process would likely be unchanged no matter whether the ALJ or the agency was in charge of determining the facts and law so long as the litigant lost the final decision,²⁶¹ Christopher B. McNeil surveyed participants and

officials in isolated fields of regulation in which only the industry has much interest. *Id.* This allows those with an interest in the regulated field to exercise more influence in the selection of regulatory officials than they could exercise in selection of officials with broader jurisdiction. *See id.*

²⁵¹ Flanagan, *An Update*, *supra* note 3, at 425–26. He cites Oregon and North Carolina as examples. *Id.* at 426.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.* at 419–20 (citing Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571 (2001)); *see also id.* at 426 (incorporating the earlier discussion of Daye’s results into the analysis).

²⁵⁶ *See id.* at 426.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *See id.*

²⁶¹ *See supra* notes 252–260 and accompanying text.

their counsel in drivers license revocation hearings conducted in New York, Florida, and California (where presiding officers in administrative hearings to revoke drivers licenses are in-house agency employees), and Maryland, Oregon, and Texas (where the presiding officers in administrative hearings to revoke drivers licenses are central panel ALJs not connected with the drivers license agencies).²⁶² He found that regardless of outcome (most of the drivers lost), the drivers' level of satisfaction with the hearing process was significantly higher in those jurisdictions in which the presiding officers were perceived to be independent of the drivers licensing agency.²⁶³

C. *The Rossi Articles*

Professor Rossi has written two law review articles on central panel ALJ final decision authority.²⁶⁴ He argues that ALJ finality increases ALJ independence, but that it also decreases agency accountability.²⁶⁵ This decrease results from the agency's lack of opportunity to review and correct "bad" ALJ decisions.²⁶⁶ Rossi says the resulting split of executive authority between the agency and ALJ raises constitutional concerns.²⁶⁷ However, he concedes this split of authority probably does not violate either state or federal constitutions.²⁶⁸ Rossi proposes to restore the proper balance between the ALJ and the agency.²⁶⁹ He wants to alter judicial review

²⁶² See Christopher B. McNeil, *Perceptions of Fairness in State Administrative Hearings*, 92 JUDICATURE 160 (2009).

²⁶³ See *id.* at 162–64; see also Christopher B. McNeil, PERCEPTIONS OF FAIRNESS IN AGENCY ADJUDICATIONS: APPLYING LIND & TYLER'S THEORIES OF PROCEDURAL JUSTICE TO STATE EXECUTIVE-BRANCH ADJUDICATIONS (2008). This is a more complete version of McNeil's study. It was McNeil's dissertation for his degree as Doctor of Philosophy in Judicial Studies at the University of Nevada, Reno.

²⁶⁴ Rossi, *Final Orders On Appeal*, *supra* note 3; Rossi, *Final, but Often Fallible*, *supra* note 3.

²⁶⁵ Rossi, *Final, but Often Fallible*, *supra* note 3, at 54–55.

²⁶⁶ See *id.*

²⁶⁷ See *id.* at 55, 66.

²⁶⁸ See *id.* at 64–66.

²⁶⁹ *Id.* at 66.

standards to give greater weight to agency law and policy positions and less weight to the law and policy the ALJ applies to decide the case.²⁷⁰

I have read through both Rossi articles several times. I have heard Professor Rossi explain the views he expresses in these articles in person. I have also read Professor Flanagan's explanation of Professor Rossi's views.²⁷¹ I must nonetheless confess that I still find the methodology Rossi wants the reviewing court to apply confusing, particularly insofar as to how it would differ in practice from what would occur if the courts just used the same procedure reviewing courts customarily now use to review agency decisions. Flanagan has commented on Rossi's views extensively.²⁷² He says that "Rossi's proposal requires the reviewing court to evaluate the ALJ's final decision . . . against the agency's policy and legal framework"²⁷³ He says that "the agency's policy and legal framework . . . includes the predicates for [the agency's] positions, the agency goals, its regulatory values, and their relative weight . . . as articulated in the record and agency briefs."²⁷⁴ The reviewing court would apply the substantial evidence or clearly erroneous standard of review "to determine whether the ALJ's policy decision was arbitrary and capricious, or clearly erroneous."²⁷⁵ If the ALJ's policy decision conflicted with the agency's policies, "the court would be free to overturn it in favor of the agency's position."²⁷⁶ Flanagan states that,

Making the agency's policy the gauge in reviewing the ALJ's policy decisions restores the agency's role in policy development, provides it an incentive to carefully articulate the policy in the contested case, and ultimately makes the agency accountable for the

²⁷⁰ *Id.* at 72–73.

²⁷¹ See Flanagan, *An Update*, *supra* note 3, at 428–30.

²⁷² See *id.* at 430–32.

²⁷³ *Id.* at 430.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

decisions made by the ALJ, even though there was no formal agency review of the ALJ's decision.²⁷⁷

Although Flanagan supports Professor Rossi's effort, he doubts that the effort will succeed.²⁷⁸ Flanagan has two main problems with Professor Rossi's proposal.²⁷⁹

First, it relies on judicial review and only a "few cases . . . reach the appellate courts."²⁸⁰ Flanagan notes that, "the first appeal in state administrative law is to a trial court," which normally does not render a written opinion.²⁸¹ Only a few cases move from the trial court to an appellate court, which will render a written opinion.²⁸² Although the cases in which written opinions are rendered "may be the more important ones," there will probably be too few of them to provide much guidance.²⁸³ Further, "The appellate process . . . is particularly slow, and there may be months, if not years," before the appellate courts rule on the issues presented to them.²⁸⁴ Flanagan states that,

At best, changing the standards of review will provide an opportunity in a few cases to reverse a particularly egregious deviation of policy. Such cases may stand for the general principle that agency policy should prevail, but these appellate proclamations will be so few that they will be only guideposts, and will not serve as an effective means of insuring that ALJs do follow the appropriate policy. The policy established by the ALJ will be dominant simply because few cases are appealed. Agency appeals of

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *See id.*

²⁸⁰ *Id.*

²⁸¹ *See id.*

²⁸² *Id.* at 430–31.

²⁸³ *Id.*

²⁸⁴ *Id.* at 431.

some cases are possible, but it is not practical or cost efficient to do so in every appropriate case.²⁸⁵

Second, Flanagan is also concerned that the reviewing court will only intervene on the side of the agency if the ALJ's rulings on applicable policy and law "substantially deviate" from the agency's views of applicable policy and law.²⁸⁶ But, what is more likely is that policy differences between ALJ and the agency will be substantial, but not unreasonable enough to cause a reviewing court to reject the ALJ's decision.²⁸⁷

Flanagan also states that he sees some other significant problems in altering standards of judicial review.²⁸⁸ Usually, judicial review standards are established by statute instead of common law.²⁸⁹ Flanagan thinks it unlikely that a legislature that established ALJ finality and a diminished agency role would turn around and increase the agency's power in adjudication by altering judicial review standards in the agency's favor.²⁹⁰ He thinks the courts would have little incentive to alter standards in the agency's favor.²⁹¹ Flanagan also notes that it is not certain that a change in standards, even if it could be accomplished, would be meaningful.²⁹² Although there are "subtle distinctions" in the substantial evidence and clearly erroneous standards, "it is not clear that they actually produce significant differences in the results."²⁹³

Flanagan says, in the end, the change of the standards of appellate review would alter the outcome of too few cases to have any significant impact.²⁹⁴ The agency would be "dependent on two independent actors, the ALJ and the courts," to enforce its views on

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *See id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 432.

²⁹³ *Id.*

²⁹⁴ *Id.*

law and policy.²⁹⁵ Flanagan argues that the agency could therefore “legitimately disavow responsibility for the law” and policy as developed in adjudication.²⁹⁶

XI. NEAR CONSENSUS THAT ALJS SHOULD HAVE FINAL DECISION
AUTHORITY IN SOME CASES

In a surprise ending to his second article, Professor Flanagan, who in the remainder of his writings on final decision-making by central panel ALJs, has adamantly opposed the concept, writes:

Another option, perhaps the best one, is to consider ALJ finality in the context of specific programs and specific contested issues. . . . State administrative law is characterized by a vast range of contested cases from the most complex multiparty environmental matters to simple hunting license revocations. ALJ finality may be appropriate for some types of cases. Recent history shows that some states have adopted it for a few programs, and agencies have relinquished their review authority for some matters.

The factors to be considered in making this decision are those that emphasize the strengths of the ALJ and at the same time, eliminate or moderate the adverse consequences of ALJ finality to the agency. The ALJ’s strengths are in providing procedural regularity, evaluating factual evidence, resolving conflicting evidence, and determining credibility. The agency’s contributions are its subject matter expertise, institutional experience with those regulated, and authority to make policy. The best cases for ALJ finality are those requiring determination of well defined issues of historical fact . . . perhaps involving credibility determinations, where the ALJ applies (but does not make) established policies to those facts.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

Driving license cases are one example of this class of cases These, and comparable cases, are primarily fact determinations of recurring enforcement scenarios where policy issues have long been identified and resolved through regulation and precedent. These cases do not have any significant need for agency review because they are unlikely to raise or to require the development or modification of agency policy. Agency review provides little additional benefits after a hearing before the ALJ and may delay any judicial review.²⁹⁷

Michael Asimow has also argued for many years that not all ALJ initial decisions should receive agency review. He has written on this subject as follows:

Agency review of initial decisions made by administrative judges is costly. It occupies the time of the staff members who process the appeals and of the agency heads who must decide whether to affirm summarily or to hear arguments and receive briefs in the cases. The consideration of appeals in individual cases may distract agency heads from other important business, such as making enforcement policy, supervising the enforcement staff, considering proposed rules or proposed legislation, or engaging in economic analysis of the future of the industry that the agency is supposed to regulate. The burden of deciding adjudicative appeals may be substantial, especially where the agency heads are part-timers.

Moreover, the agency appeal stage can be quite time-consuming; it can delay a final decision by months or years, with possible damage either to public or private interests. Thus, it would seem that both the effectiveness or regulatory programs and the efficiency with which the agency discharges its functions could be promoted by diminishing the

²⁹⁷ *Id.* at 432–33 (footnotes omitted).

number of appeals with which the agency heads must contend. Yet most [California] APA agencies and the State Personnel Board give some consideration to every proposed decision; other agencies make agency-level review available as a matter of right if either party requests it.

. . . [I]f a case (or a particular class of cases) is relatively unimportant (in terms of the regulatory program), involves no significant issues of policy or discretion, or presents purely factual issues, it might be a wiser allocation of agency resources to supply only a fair initial hearing without an agency appeal. . . . Appeals in such relatively minor cases are unlikely to be successful, so that losing an [in-house agency] appeal remedy should not be, and should not seem, unfair to litigants; instead, dispensing with agency head review will speed up the administrative process, avoid the need to pay attorneys to engage in a probably fruitless exercise, and allow truly disgruntled litigants to get to court more quickly.²⁹⁸

Professor Daniel J. Gifford, in his article, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, discussed earlier in this paper,²⁹⁹ also argues that there are some cases, which do not merit agency review, in which the ALJ decision should be final subject to an appeal to the courts.³⁰⁰

Further, in a recent article published in a Canadian law journal, Professors Michael Asimow and Jeffrey S. Lubbers state their support for a federal central hearing agency that would have jurisdiction over Social Security issues and, perhaps, other administrative hearings involving medical benefit determinations.³⁰¹

²⁹⁸ Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1109–10 (1992) (footnotes omitted).

²⁹⁹ See *supra* notes 138–145 and accompanying text.

³⁰⁰ See Gifford, *supra* notes 138.

³⁰¹ See Michael Asimow & Jeffrey S. Lubbers, *The Merits of ‘Merits’ Review: A Comparative Look at the Australian Administrative Appeals Tribunal*, 28 WINDSOR Y.B. ACCESS TO JUST. 261, 283 n.131 (2010).

They state that their initial research indicates that the central hearing agency decisions should be final except for court review without appeal to the agency based on a cost-benefit analysis that they say seems to show that providing appeals within the agency would not be cost efficient.³⁰²

As I shall discuss in Part II of this paper, the main issue causing the ALJ organizations—NAALJ, the CPDC, and NCALJ—not to support the 2010 MSAPA was the failure to include an option for the legislature to delegate ALJ final decision authority in at least some cases, as had been done in a 1997 ABA Model Act for Creation of Central Hearing Agencies. Given what is a growing consensus by the academic community that ALJ final decision authority is a preferred approach in at least some cases, it is unfortunate that the ULC and the ALJ organizations could not get together on this issue. Perhaps it is time for the ULC, supporters of the central panel-related sections of the 2010 MSAPA, and the ALJ organizations to put the acrimony of their earlier debate on this issue behind them and reevaluate the issue.

XII. SUMMARY OF THIS PAPER

This has been Part I of a two-part paper on final decision authority for central panel ALJs. Historically, in-house agency employees were stand-ins for agency heads with the function of conducting adjudicative hearings for agency heads when the agency heads were otherwise occupied. They wrote proposed decisions containing proposed fact-findings, conclusions of law, and their recommendations for a final decision. This historical practice is written into the federal APA, but is not binding on the states and can be changed by state legislatures. With the creation of central panels, a neutral ALJ to whom final decision authority may be assigned now presides in hearings in the central panel states.

Although Professors Flanagan, Rossi, and Moliterno view central panel ALJ final decision authority with alarm, they fail to make a compelling case as to why—at least with respect to fact-findings—giving central panel ALJs this authority would not be preferable to the agency occupying the dual role of both litigator and

³⁰² See *id.* at 283 n.132.

final decision-maker. This dual role contains a built-in conflict of interest that deprives the citizen of a neutral adjudication. Moreover, there is a growing consensus among both academics and state legislatures that final decision authority for ALJs (subject to court review) is appropriate in at least some cases.

This paper has argued, in part, that the law review articles opposing ALJ central panel authority rely on flawed arguments. Three states—Louisiana, South Carolina, and North Carolina—have gone to final decision authority for ALJs on both law and fact in virtually all cases. It is thought that a majority of the other central panels in most cases that come before them still follow the traditional practice of the ALJ making only recommended fact-findings and conclusions of law, with the agency head making the final decision.

Part II of this paper will compile data from a survey with regard to the extent to which central panel states have modified this traditional practice and the extent to which the modifications have been and may be under consideration in central panel jurisdictions. Part II of the paper will also consider the basis for the ALJ organization opposition to the 2010 MSAPA in more detail. It will update previously published information on the individual central panel jurisdictions.